THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, MAY 28, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

LANGDEAU V. HANES.—It seems that not only the editor of this journal, but several of our correspondents, have been led into error by the leading case of Langdeau v. Hanes (*ante*, p. 231). We now have the pleasure of publishing a history of that case, as well as a searching criticism of the result reached by the learned court, by Mr. Hallum, who was the leading counsel for the plaintiff. After all that can be said with regard to the technical soundness of the position taken by the court, we take it that the question resolves itself simply into a contest between an ancient possessor who had long slept on his rights, and a modern possessor who, without having any rights, had not slept. Under such circumstances the disinclination of courts of justice to disturb possessions would naturally have inclined the court to reach the conclusion they did, if they could find any legal reasons to support that conclusion. Whether the reasons adduced by them in this instance are sound, it is not necessary that we should express an opinion.

The Removal of Territorial Judges.

The recent act of the President in removing two of the judges of the Supreme Court of the territory of Colorado, and appointing two others in their stead, appears to have been without warrant in law and without justification in fact. If indeed power on the part of the President to remove judges exists in any case, it is clear that it ought not to be exercised except for the gravest reasons. The very existence of such a power, and the possibility that it may at any time be arbitrarily exercised, must necessarily have a tendency to destroy the independence of the judges, to degrade them, and to corrupt their integrity. Our ancestors have recognized this fact, than which none is better established in English history; and, accordingly, one of the fundamental principles of the British, and of all the American constitutions is that the judges shall not be subject to the power of removal, except for incompetency or misbehavior, which fact must first be determined in a judicial proceeding. It follows that when the power to remove a judge is exercised without clear warrant of law, it involves a vital attack upon one of the most cherished safeguards of free government, and deserves no less than impeachment.

In the case of the Colorado judges, we are unable to find any law which warrants, on the part of the President, the exercise of the power of removal. The organic act of that territory provides that the principal *ministerial* officers shall hold their offices during the period of four years "unless sooner removed by the President;" but the naked provision in regard to the judges is that "they shall hold their offices during the period of four years." Organic Act of Colorado, § 9; Amendment of 1863 to the same, § 3; Rev. Stat. Col., pp. 32, 38. We understand that the only ground on which its exercise is sought to be justified in this case is that of the *custom* and *usage* of the government in like cases. That custom and usage can not be invoked in support of the exercise of a power so fruitful of mischief, and so contrary to the principles of American government, is a proposition too plain to be argued. This matter deserves, and, we doubt not, will receive, the earnest attention of Congress at its next session. Meantime the judges thus arbitrarily displaced, although they will not be able in the face of the power at the disposal of the President, to exercise the functions of their offices, are as much judges now, as they were before; and Congress should see to it that they are reinstated, and that they have their salaries during the period of their suspension.

With respect to the new appointees, we know nothing personally, nor do we even know their names. We understand, however, that they are respectable lawyers. But we can not understand how any lawyer possessing proper self-respect, and a proper respect for the judicial office, would consent to hold such an office under such circumstances, and by such a precarious and degrading tenure, unless driven to it by stress of actual starvation.

Honors to Judge McKean.

On the 29th day of April, the members of the bar of Salt Lake city gave a dinner to Judge McKean, who had been but shortly before removed by the President from the office of chief justice of that territory. Thirty-seven lawyers signed the call; and the occasion was one sufficient to gratify the the pride of any man. Eloquent speeches were made, eulogizing in high terms the course which the guest of the evening had pursued while on the bench.

Some instruction may be derived even from after-dinner speeches; and the language in which Judge Rosborough depicted the embarrasments attending the administration of justice in Utah, is calculated to arrest the attention. He said:

Rousseau quoting an aphorism of the ancients, that it was the business of the gods to legislate for men, exclaims: "How much more exalted and responsible are the duties of those who are called to interpret and administer the laws." I may with propriety refer to a part of a system of legislation by the local gods here, which was designed to embarrass and defeat the administration of the law, and repress and extinguish the legal profession in Utah. In the first place, there was the act providing that no laws or parts of laws, except those of Congress and the local legislation, should be read, argued, cited or adopted, in any court on any trial in this territory. That excluded every figment of the common law, which lies at the foundations of our history and institutions, and which it was well known would place under ban many fashionable crimes in Utah; and this act went still further to provide, that no report or decision or doings of any court shall be read, argued, cited or adopted on any trial in any court in Utah. Thus, by one swoop all the headlights of jurisprudence in the English language, from Coke to Kent, were to be extinguished, and supplanted by the resurrection of an effete barbarism which was buried twenty centuries ago. There was method in this, for the two can not co-exist. Then there is the act concerning attorneys, which provides that no one employing counsel in any of the courts in Utah, shall be compelled by any process of law to pay such counsel for any services rendered before, or after or during the trial. Further, by this Utah law, in violation of every rule of professional confidence, an attorney in each case is brought forward as a witness, and required under heavy penalties to "present all the facts in the case, whether they are calculated to make against his client or not." There was method in this also. Thus the legal profession was to be suppressed, so that the oppressed might be left without remedy and the oppressor without rebuke or accountability. Out of a mass of such legislation, this little taste will suffice.

Judge Hayden.—How about the municipal corporations spread over the territory?

Judge Rosborough.—Time will not allow me to go further into this theme, except to say that that was a part of the system employed in Utah, from the

start, to build up a separate distinct government, with an independent code of laws and a separate judiciary to administer them in the new fashion I have alluded to—a system of government at war with all our institutions and republican ideas.

My residence in Utah does not date as far back as my friend Major Hempstead's. When I came here, almost four years ago, for the first time on American soil I found no bed-rock of the common law to stand upon—that compound of reason, time and experience, which must exist from slow growth or by legislative adoption. In the midst of such a desert of legislation, which had produced little but thorns and poisonous fruits, I felt the full force of the maxim that miserable is the servitude where the law is vague or uncertain.

In such a field, in the midst of the spirit which has produced the political monstrosity of Utah, I first saw the guest of this evening, then presiding in court not far from here. The occasion was an exciting one, well calculated to alarm and intimidate any one who is not a brave and cool man. The militia in various parts of Utah were drilling in bodies, and on the alert and ready to obey the first order for open resistance to the government. A cause then before the court had attracted a large crowd. The streets about the court room, and the room itself, were crowded with armed men, excited, fierce, earnest and fanatical, ready to go to any extreme of violence and bloodshed—the last occasion of any open show of resistance in Utah. In the midst of the swelling and threatening tumult, he sat upon the bench calm and undaunted, and I never saw a more perfect example of Horace's picture of undaunted courage. A man just and firm in his purposes, not the depraved ardor of the shouting rabble, nor the presence of the frowning tyrant, can shake him from his firm faith and duty.

It is obvious that a just estimate can not be formed of Judge KcKean's judicial career, or a just criticism be passed upon the conduct of his successor, without carefully bearing in mind the anomalous state of things depicted in the above remarks. We confess that such surroundings seem well calculated to overturn the judicial temperament of any judge, and to excite in his mind the hallucination that he is filling the *role* of a general of cavalry. Our previous suspicion that this hallucination possessed the mind of Judge McKean to some extent while on the bench, has been strengthened by the following remarkable language which he himself used on this occasion, couched in the Bret Harte style of rhetoric:

My legal comrades, we have been trying to march together over a rough, crooked, ungraded road, in the midst of dense darkness. If I have sometimes stumbled, you have been groping near me, and you have felt, even when you could not always see the unprecedented obstacles in my way. You too have sometimes stumbled. At last, "some one has blundered," and I have fallen. But unlike martial combatants who rush on and leave their fallen comrades, you pause; you reach out to me your helping hands as I rise to my feet; you offer me cooling draughts from your canteens; you fan away the fœtid breath of slander, and you speak to me words of kindness. Thanks, my faithful friends, thanks. My stunned senses will soon rally. The blow staggers me—it shall not slay me! [Tears?]

There, now, let me go quietly to the rear while you go on with my honored successor, a gentleman for whom I can not bespeak a greater favor, than that you extend to him the same generous consideration with which you have always honored me. I said, let me go to the rear; but, before I turn away, I cry to you, behold, even while we pause, the dense darkness of Utah is breaking away! Look, the day-star is mounting up the sky, and the saffron tints of the morning are fringing the mountain peaks:

"God says, let there be light!
Grim darkness feels his might
And flies away!
Lo, startled seas and mountains cold
Shine forth all bright in blue and gold,
And cry, 'tis day! 'tis day!"

We trust that the successor of Judge McKean may, like Lord Coke, see his way in the midst of the difficulties which surround him, to "act as becomes a judge."

The Missouri Constitutional Convention.

Most of the last week was consumed by this body in discussing the various sections of the bill of rights reported from committee by Mr. Gantt of Saint Louis. The first two sections, which related to the distribution of political power, occupied four days; and, with some exceptions, the debates were calculated to inspire a feeling of respect for the convention. The first section of the bill of rights as reported from committee, reads as follows:

That all political power is vested in the people of the state, with those limitations only which are imposed on them by the constitution of the United States, and that the government hereby established is clothed with that portion of the political power thus inherent in the people, which is defined, ascertained and remitted to some department thereof by this instrument.

This section was the subject of an animated debate which lasted two days, taking a wide range, during which some of the members lost their moorings, and even felt called upon to define their position with regard to loyalty and disloyalty. It resulted in the adoption of the following substitute:

That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their good only, and is instituted solely for the good of the whole.

The second section of the bill as reported read as follows:

That the powers not thus defined, ascertained and committed to some one of the departments of the government hereby established, are reserved to the people and constitute that mass of governmental powers, the presence or absence of which distinguishes arbitrary from limited government.

In lieu of this the following substitute, proposed by Mr. Broadhead of Saint Louis, was adopted:

That the people of this state have the inherent, sole and exclusive right of regulating internal government and police thereof, and of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness; that Missouri is a free and independent state, subject only to the constitution of the United States, and that the preservation of the states and maintenance of their governments, are necessary to an indestructible Union and were intended to coexist with it. The legislature is not authorized to adopt, nor will the people of the state ever assent to, any amendment or change of the constitution of the United States which may in any wise impair the right of local self-government belonging to the people of this state.

The third section was agreed to, as follows:

That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and that when government does not confer this security it fails of its chief design.

The fourth section, which provided that the people of this state have now and always the inherent, exclusive and inalienable right, subject to the limitations before mentioned, of regulating, altering and amending their state government whenever and in such manner as to them shall seem expedient, was not agreed to.

The fifth section as adopted reads as follows:

That all men have natural and indefeasible rights to worship Almighty God according to the dictates of their own consciences; that no person can on account of his religious opinions be rendered ineligible to any office of trust or profit under this state, nor be disqualified from testifying or serving as a juror; that no human authority can control or interfere with the rights of conscience; that no person ought, by any law, to be molested in his person or estate on account of his religious persuasion or profession, but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness inconsistent with the good order, peace or safety of the state, or with the rights of others.

The sixth was agreed to. It is as follows:

That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, preacher, minister or teacher of any sect, church, creed or denomination of religion; but that if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same.

Section seven was also agreed to, as follows:

That no money shall ever be taken from the public treasury, directly or in-

directly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no prefer ence shall be given to, nor any discrimination made against any church, sect, denomination or creed of religion, or any form of religion, faith or worship.

The sweeping provision to which we called attention last week, prohibiting devises or gifts of land to religious corporations was stricken out, and the following substitute, couched in clumsy and obscure language, was, on motion of Mr. Adams, adopted:

That no religious corporation can be established in this state except such as may be created under a legal [?] law, for the purpose only of holding the title to such quantities of real estate as may be prescribed by law for church edifices, parsonages and cemeteries.

The ninth amendment, that all elections ought to be free and open, was agreed to.

Mr. Shields introduced a substitute for section ten, which was adopted, as follows:

That courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property and character, and right and justice should be administered without denial or delay.

Section eleven was agreed to, as follows:

That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing can issue without describing the place to be searched or the person or thing to be seized as nearly as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

At the time of the close of our report, the convention was debating, in committee of the whole, the twelfth section, which prohibits, with certain exceptions, the trial of persons charged with crime, upon information. This opened up a general discussion of the grand jury system, the result of which we hope to give next week.

It should be stated that the committee on representation made its report; but as this question is exclusively political and local, we shall not trouble our readers with a summary of it.

Disaffirmance of their Voidable Contracts by Infants.

In the case of the disaffirmance by infants of contracts, executed in whole or in part on both sides, there is considerable diversity among the authorities as to whether the infant shall be required on such disaffirmance to restore the consideration received by him.

It must be premised, however, that contracts for the sale of real estate can not be disaffirmed by the infant till he arrives at his majority, while contracts as to personalty may be disaffirmed by him before that time, or within a reasonable time thereafter. Stafford v. Roof, 9 Cow. 626; Shipman v. Horton, 17 Conn. 481; Bool v. Mix, 17 Wend. 120.

The policy of the law seems to require the infant, on such disaffirmance by him, to place the adult *in statu quo* so far as possible, consistently with the preservation of his privilege, which is designed as a shield and not as a sword. But the protection of the infant is the main object, and the other seems to be secondary in importance, and must yield when its exercise is inconsistent with the former. Accordingly, when the infant elects to disaffirm his voidable contract, he must disaffirm *in toto*, as well as that portion which is to his advantage, as that which is onerous to him. Heath v. West, 28 N. H. 108; Roberts v. Wiggin, 1 N. H. 73; Bigelow v. Kenney, 3 Vt. 353; Richardson v. Boright, 9 Vt. 372; Weed v. Beebe, 21 Vt. 495; Hubbard v. Cummings, 1 Me. 11; Young v. McKee, 13 Mich. 556; Cogley v. Cushman, 16 Minn. 402; Skinner v. Maxwell, 66 N. C. 45; Lowry v. Drake, 1 Dana (Ky.) 46.

And accordingly, also, it seems well settled that if he rescinds his contract and seeks to reclaim the consideration moving from him, he must restore the consideration received by him, if in his possession or control, and that on tendering back such consideration, he may be allowed to recover. Carr v. Clough, 26 N. H. 280; Price v. Furman, 27 Vt. 268; Riley v. Mallory, 33 Conn. 201; Robinson v. Weeks, 56 Me., 102.

Indeed, some of the cases lay down the doctrine generally, that he must return the consideration, without any qualification whatever as to whether it is in his possession or not. See Holmes v. Blogg, 8 Taunt. 508; Womack v. Womack, 8 Tex. 417; Cummings v. Powell, 8 Tex. 93; Kilgore v. Jordan, 17 Tex. 355; Stuart v. Baker, 17 Tex. 421; Kerr v. Bell, 44 Mo. 125; Highley v. Barron, 49 Mo. 107; Baker v. Kennett, 54 Mo. 88; Taft v. Pike, 14 Vt. 409; Farr v. Sumner, 12 Vt. 32.

Or that where that can not be done, he must place the other party in as good a condition as though he had returned it, or must account for the value of it, before he can recover back the consideration that has passed from him. See Bailey v. Bamberger, 11 B. Mon. 113; Bartholomew v. Finnemore, 17 Barb. 430; Locke v. Smith, 41 N. H. 346; Heath v. Stevens, 48 N. H. 251. See also Benj. on Sales (1 Am. Ed.) § 24, note f.

Or that when he seeks relief in equity, he must, as a condition of relief, do equity to the other party by restoring or accounting for the consideration. See remarks of Christiancy J., in Prout v. Wiley, 28 Mich. 168; Ray, J., in Miles v. Lingerman, 24 Ind., 387; Chilton, Ch. J., in Manning v. Johnson, 26 Ala. 451; Hillyer v. Bennett, 3 Edw. Ch. 222; Smith v. Evans, 5 Hump. 70.

Some cases, however, hold, that though on the avoidance of the contract, the adult is entitled to the property remaining in the hands of the infant, in whatever condition it may be, yet the infant is not bound to make any tender at all before commencing his action. See Carpenter v. Carpenter, 45 Ind. 142, and cases there cited.

The doctrine laid down in Holmes v. Blogg, 8 Taunt. 508 (as explained in Corpe v. Overton, 10 Bing. 252), and the cases which follow it, seems to be that in such cases, where the infant has received a benefit under the contract, he can not rescind and recover back the consideration moving from him to the adult, unless the adult can be placed *in statu quo*, a proposition which, if given full effect, will, in a majority of cases where the infant has received any benefit whatever under the contract, deny to him all the protection of his privilege, and instead afford ample protection to the adult, who, if he must be placed *in statu quo* before the privilege is allowed to be exercised, incurs no risk whatever in contracting with the infant. See remarks of the court in Corey v. Burton, Supreme Court of Michigan, MSS., April Term, 1875.

But the true doctrine, and the one supported by the weight of reason and authority, seems to be that where the infant disaffirms his executed contract after arriving at age, and seeks a recovery of the consideration moving from him, and

where the specific consideration received by him remains in his hands in specie at the time of disaffirmance and is capable of return, it must be returned by him; but if he has during infancy wasted, sold, or otherwise disposed of, or ceased to possess the consideration, and has none of it in his hands in kind on arriving at majority, he is not liable therefor, and may disaffirm without tendering or accounting for such consideration. See Mustard v. Wohlford, 15 Gratt. 329; Price v. Furman, 27 Vt. 268, and the cases therein cited; Walsh v. Young, 110 Mass. 399; Bartlett v. Drake, 100 Mass. 176. Gibson v. Soper, 6 Gray 282; Chandler v. Simmons, 97 Mass. 514; Manning v. Johnson, 26 Ala. 452; Carpenter v. Carpenter, 45 Ind. 142. See also Briggs v. McCabe, 27 Ind. 330; Miles v. Lingerman, 24 Ind. 387.

And such desposition of the consideration during minority is not a conversion. Fitts v. Hall, 9 N. H. 445; Carr v. Clough, 26 N. H. 294.

Where the contract is executory on the part of the infant and he disaffirms it, and still retains the property received by him thereunder, the adult may after demand and refusal maintain trover, replevin or detinue therefor. When such a contract is avoided, the parties revert to their original situation, and of course the adult becomes again entitled to the possession of his property, and any detention thereof after demand therefor becomes wrongful. Badger v. Phinney, 15 Mass. 359; Boyden v. Boyden, 9 Met. 519; Jefford's Admr. v. Ringgold, 6 Ala. 544; Mustard v. Wohlford, 15 Gratt. 329; Fitts v. Hall, 9 N. H. 446; Strain v. Wright, 7 Ga. 572; Carpenter v. Carpenter, 45 Ind. 142; Carr v. Clough, 26 N. H. 294. M. D. E.

Life Insurance—False Answers to Interrogatories—Warranties.

JEFFRIES v. THE ECONOMICAL MUTUAL LIFE INSURANCE COMPANY.

Supreme Court of the United States, No. 209,—October Term, 1874.

1. **Life Insurance—False Statements of Assured—Materiality of—Pleading.**—In a suit on a policy of life insurance, an answer which sets up that the assured made certain false statements in answer to questions propounded to him by the insurer, at the time of his application for the policy, by reason of which the policy in pursuance of its terms, became void,—presents a good defence, without alleging that the false answers were *material* to the risk assumed.

In error to the Circuit Court of the United States for the Eastern Distict of Missouri.

Mr. Justice HUNT delivering the opinion of the court.

The plaintiff, as administrator of Allan A. Kennedy, brought his action against the Economical Insurance Company, alleging that on the 19th day of October, 1870, it issued a policy of insurance upon the life of Kennedy, in the sum of $5,000, which policy was set forth at length; that Kennedy died in August, 1871, and that notice had been given to the company of his death, payment of amount of insurance demanded and refused.

The policy contained the clauses following, viz:

"This policy is issued by the company, and accepted by the insured and the holder thereof, on the following express conditions and agreements, which are part of this contract of insurance:

"First. That the statements and declarations made in the application for this policy, and on the faith of which it is issued are in all respects true and without the suppression of any fact relating to the health or circumstances of the insured, affecting the interests of said company.

"Sixth. That in case of the violation of the foregoing conditions, or any of them, or of the insured dying in, or in consequence of, a duel, or in violation of the laws of the United States, or of any nation, state, or province, or by reason of intoxication, this policy shall become null and void."

The answer of the defendant, among others, contained the following allegations: That the policy was by this defendant issued, and by the said Kennedy accepted, on the following express conditions and agreements contained in said policy, and made part of said contract of insurance, to wit, that the statements and declaration made in application for said policy, and on the faith of which it was issued were in all respects true, and without the suppression of any fact relating to the health or circumstances of the assured affecting the interests of the defendants, and upon the further condition, to wit, that in case of the violation of the aforesaid condition, among others, or of the insured dying in, or in consequence of a duel, or violation of the laws of the United States, or of any nation, state, or province, or by reason of intoxication, said policy should become null and void. That said Allan A. Kennedy did violate the first condition in this, that the statements and declarations made by the said Kennedy in his application for said policy of insurance, were not in all respects true, but were false in the following respects, to-wit: Defendant says, that in and by said application for said policy of insurance, and on the faith of which said policy was issued, the said Kennedy, in answer to the question therein asked of him, as to whether he was married or single, stated that he was single, meaning thereby that he was a single and unmarried man, whereas in truth and fact, said Kennedy was then and there a married man, having a wife then living, as he the said Kennedy then and there well knew.

Defendant further says that in and by said application for said policy of insurance, and on the faith of which said policy of insurance was issued, the said Kennedy, in reply to the question therein asked of him, "Has any application been made to any other company; if so, when?" answered, "No;" meaning thereby that he, the said Kennedy had not, prior thereto, applied for insurance on his life to any other life insurance company; whereas, in truth and in fact, said Kennedy had, prior thereto, to-wit, on or about the month of April, 1870, applied for insurance upon his life, to the Mutual Life Insurance Company of New York, and had been insured therein in the sum of ten thousand dollars, as the said Kennedy at the time of making said answer then and there well knew.

To this plea a demurrer was interposed which was sustained by the court below. From the judgment entered upon this demurrer, the present writ of error is brought.

The contention in opposition to the judgment is this: that the plea does not aver that the false statements made by the assured were material to the risk assumed. Is that averment necessary to make the plea a good one?

It is contended, also, that the false answers in the present case were not to the injury of the company, that they presented the applicant's case in a less favorable light to himself than if he had answered truely. Thus, to the enquiry, are you married or single, when he falsely answered that he was single, he made himself a less eligible candidate for insurance than if he had truly stated that he was a married man; that although he deceived the company, and caused it to enter into a contract that it did not intend to make, it was deceived to its advantage, and made a more favorable bargain than was supposed. This is bad morality and bad law. No one may do evil that good may come. No man is justified in the utterance of a falsehood. It is an equal offence in morals whether committed for his own benefit or that of another. The fallacy of this position as a legal proposition will appear in what we shall presently say of the contract made between the parties.

We are to observe, first, the averments of the plea, that Kennedy, in and by his application for the policy of insurance, in answer to a question asked of him by the company, whether he was "*married or single?*" made the false statement that he was "*single*," knowing it to be untrue; that in reply to a further ques-

tion therein asked of him by the company, whether "*any application had been made to any other company? If so, when?*" answered "*no*," "*whereas, in fact, at the time of making such false statement, he well knew that he had previously made application for such insurance, and been insured in the sum of ten thousand dollars by another company.*" Secondly, we are to observe the averment: That the statement and declarations made in the application for said policy, and on the faith of which it is issued, *are in all respects true*, and without the suppression of any fact relating to the health or circumstances of the insured affecting the interests of the company.

We are to observe also this other clause of the policy, in which it is declared that this policy is made by the company, and accepted by the insured upon the express condition and agreement that such statements and declarations are in all respects true. This applies to all and to each one of such statements. In other words, if the statements are not true it is agreed that no policy is made by the company, and no policy is accepted by the insured.

The proposition at the foundation of this point is this: that the statements and declarations made in the policy shall be true. This stipulation is not expressed to be made as to important or material statements only, or those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties. They need not be representations, even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression—what the applicant states, and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithful performance of this agrement is made an express condition to the existence of a liability on the part of the company. There is no place for the argument, either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it. It is the distinct agreement of the parties that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise bargain. The right to make contracts carries with it the right to determine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal.

The case in hand affords a good illustration of this principle. The company deems it wise and prudent that the applicant should inform them truly whether he has made any other application to have his life insured. So material does it deem this information that it stipulates that its liability shall depend upon the truth of the answer. The same is true of its enquiry whether the party is married or single. The company fixes this estimate of its importance. The applicant agrees that it is thus important by accepting this test. It would be a violation of the legal rights of the company to take from it its acknowledged power thus to make its opinion the standard of what is material, and to leave that point to the determination of a jury. The jury may say, as the counsel here argues, that it is immaterial whether the applicant answers truly if he answers one way, viz., that he is single, or that he has not made an application for insurance. Whether a question is material, depends upon the question itself. The information received may be immaterial. But if under any circumstances it can produce a reply which will influence the action of the company, the question can not be deemed immaterial. Insurance companies sometimes insist that individuals largely insured upon their lives, who are embarrassed in their affairs, resort to self-destruction, being willing to end a wretched existence if they can thereby bestow comfort upon their families. The juror would be likely to repudiate such a theory on the ground that nothing can compensate a man for the loss of his life. The juror may be right and the company may be wrong. But the company has expressly provided that their judgment, and not the judgment of the juror, shall govern. Their right thus to contract, and the duty of the court to give effect to such contracts, can not be denied.

Of the authorities in support of these views, a few only will be mentioned. In Anderson v. Fitzgerald (4 Ho. Lords Cases, 474), Fitzgerald applied to an insurance office to effect a policy on his life. He received a form of proposal containing questions required to be answered. Among them were the following: "Did any of the party's near relatives die of consumption or any other pulmonary complaint?" and "has the party's life been accepted or refused at any office?" To each of these questions the applicant answered "no." The answers were false. F. signed the proposal and a declaration accompanying, by which be agreed "that the particulars above mentioned should form the basis of the contract." The policy mentioned several things which were warranted by F., among which these two answers were not included. The policy also contained this proviso: that "if anything so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statement made to the company in or about the obtaining or affecting of this insurance," the policy should be void. On the trial before Mr. Justice Ball he charged the jury "that they must not only be satisfied that the various false statements were false in fact, and were made in and about effecting the policy, but also that such false statements were material to the insurance." A bill of exceptions was tendered on the ground that the jury should have been directed "that if the statements were made in and about effecting the insurance, and such statements were false in fact, the defendants were entitled to a verdict, whether such statements were or were not material" (p. 487). The exceptions were argued in the Court of Exchequer, where judgment was ordered for the plaintiff on the verdict. A writ of error was brought in the Court of Exchequer Chamber, where the judgment was affirmed by a majority of seven to three. The writ of error to the House of Lords was then brought. Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Creswell, Mr. Baron Platt, Mr. Justice Talfourd, Mr. Justice Williams, Mr. Baron Martin and Mr. Justice Crompton attended.

Opinions were delivered by Mr. Baron Parke, the Lord Chancellor, Lord Brougham, and Lord St. Leonards, all concurring in reversing the judgment on the ground that the question of the materiality of the statements should not have been submitted to the jury. This case was decided upon facts almost identical with the one before us, and presented the precise question we are considering. The counsel for the defendants asked for a ruling, that if the statements were untrue the defendants were entitled to a verdict, whether they were or were not material. This was refused, and the judge charged that to entitle the defendants to a verdict the statements must not only be false, but material to the insurance. This was held to be error, and the judgment was reversed.

Cazenore v. British Equitable Ass. Co., 6 Com. Bench, N. S. 437; 2 Crampton & M. 348, is a familiar case. The opinion was delivered by Cockburn, C. J., of the common pleas, and decided in the same way. This case was affirmed in the Exchequer Chamber in 1860, See 6 Jur. N. S. 826, 1860; 3 Bigelow Cases, 213; Price v. Phœnix Ins. Co., 17 Minnesota R. 497.

Many cases may be found which hold that where false answers are made to enquiries which do not relate to the risk, the policy is not necessarily avoided unless they influenced the mind of the company, and that whether they are material, is for the determination of the jury. But we know of no respectable authority which so holds where it is expressly covenanted as a condition of liability that the statements and declarations made in the application are true, and when the truth of such statements forms the basis of the contract.

The counsel for the insured insists that policies of insurance are hedged about with so many qualifications and conditions, that questions are propounded with so much ingenuity and in such detail, that they operate as a snare, and that justice is sacrificed to forms. We are not called upon to deny this statement. The present, however, is not such a case. The want of honesty was on the part of the applicant. The attempt was to deceive the company. It is a case, so far as we can discover, in which law and justice point to the same result, to-wit, the exemption of the company.

JUDGMENT AFFIRMED.

Assault on a Play-Actor—Damages—Doctrine of Exemplary Damages.

CHARLES M. WELCH v. GEORGE WARE.

Supreme Court of Michigan, April 30, 1875.

Hon. BENJ. F. GRAVES, Chief Justice.
" THOMAS M. COOLEY, } Associate Justices.
" JAMES V. CAMPBELL, }
" ISAAC MARSTON. }

1. **Assault—Basis for Computing Damages.**—In estimating damages to a man from an assault, the jury have a right to know all his business surroundings, and his expenses and earnings, as nearly as they can be ascertained.

2. **Exemplary Damages—Mitigating Circumstances.**—In laying exemplary damages, a jury should distinguish between provoked and unprovoked injuries, giving adequate compensation in all cases, but giving heavier damages whenever the wrong is aggravated by malice or bad motives. Excitement may be considered in mitigation, but unreasonable passion should not be. The question rests mainly in the discretion of the jury.

3. **Wilful Injury—Pecuniary Damages for Mental Suffering.**—It is to be assumed that wilful wrong brings damage upon the injured person, and that the injury is mainly mental and not physical; so that if the sufferer is neither personally hurt or at pecuniary loss, he should still recover pecuniary amends for the injury done his feelings. As the actual damage can not be measured by a money standard, all redress in damages must partake of a punitory character, and must be determined by the jury's sense of justice, and knowledge of human nature.

Opinion of the court by CAMPBELL, J.*

Welch owns a theater in Detroit, in which Ware and his wife had been filling an engagement. An actor by the name of McDonald had been arrested for a felonious assault upon an infant performer called Baby McDonald, who had been in his charge, but was not his child. This seems to have been followed by various transactions bearing on alleged measures to get McDonald out of the country, and there is conflicting testimony as to the complicity herein of both Welch and Ware, and also as to their attempting to get the child out of the way to prevent the prosecution. It is claimed that two days after the close of Ware's engagement, Welch got a suspicion that Ware had, in bad faith, been stirring up the difficulty, in order to get the child, who was an attractive performer, away from the theater. He sent for Ware to come to a neighboring saloon, and when Ware arrived an altercation took place. Welch appears to have made, without adequate provocation, an assault upon Ware, and to have inflicted serious injuries which for a time disabled Ware from following his business. Ware recovered judgment for damages upon a declaration which, besides setting out various immediate items of injury and suffering and expenses, averred a hindrance in his affairs and business, and a loss of profits which he would have derived from his occupation as a theatrical performer. The exceptions relate to the admission of testimony and the question of damages.

Evidence to serve as a Basis for estimating Damages arising from Tort.—As to loss of time and professional gains, the objections to testimony apply to proof of the sum he was paying per week for board for himself and family, of the value of the joint service of himself and wife, and of the proportion which his services were worth. The estimate of witnesses is objected to as not local and as indefinite; proof of actual engagements and the amount earned is also objected to. The objection that such proof was not within the declaration, if otherwise competent, can not be maintained. A great variety of circumstances may be admitted to explain the various ways in which profits have been diminished. Chandler v. Allison, 10 Mich. 460; Allison v. Chandler, 11 Mich. 542. It is necessary to inform the jury as thoroughly as possible concerning all the circumstances and business surroundings of the plaintiff. Unless they know his expenses and the value of his earnings, they will lose information of the first importance concerning the extent of his pecuniary damage. Inability to compute these accurately is no reason why the jury should not get such information as may be had; and a wrong doer must bear the risk, if there is any, of not reaching an exact result, because it is not the plaintiff's fault that the enquiry has become necessary. Where no better means can be had, the jury must use their best judgment, and it is to be presumed that counsel will urge before them all considerations which will aid them in avoiding injustice. So far as this joint engagement is concerned, the charge of the court confined the right of recovery to Ware's own share of the earnings. This was favorable enough. There is no rule which would necessarily determine that the husband is to enjoy no more than such a proportion, and it would not be strange or unreasonable if a wife should abstain from any engagements away from her husband. The defendant Welch was not damnified by any of these rulings. Evidence of the actual gains and engagements of a plaintiff, in action of tort, is held admissible as one means of reaching his probable profit and losses. And as this actor's business was not local, but extended generally over the country, the opinions and proof of value could not be confined to Detroit or any other locality. Upon the question of allowing damages from loss of probable gains and the means of estimating them, see Gilbert v. Kennedy, 22 Mich. 117; Burrell v. New York & Saginaw Solar Salt Company, 14 Mich. 34. And for limitations on this subject, see Allison v. Chandler, *supra*, and Warren v. Cole, 15 Mich. 265. For the construction applicable to allegations of damages, see the cases before cited, and Johnson v. McKee, 27 Mich. 471.

[Here, the learned judge discussed certain points of evidence, and then proceeded:]

Damages—Actual and Consequential. The remaining questions all bear upon the power and duty of the jury in increasing damages, and in passing on questions of mitigation and aggravation. By giving any verdict at all for Ware, the jury found in this case, that he had been assaulted wilfully and without justification. He was therefore entitled, beyond controversy, to all of his actual damages. But as it is claimed that these can not be increased or aggravated by the vindictive feelings or the degree of malice of the assailant, from which it is said, no additional harm can come to the party injured, it is urged that vindictive or exemplary damages are improper. The common sense of mankind has never failed to see that the injury done by a wilful wrong to person or reputation, and in some cases to property, can not be measured by the consequent loss in money. A person assaulted may not be disabled, or even disturbed in his business, and may not be put to any outlay in repairs or medical services. He may not incur any pecuniary damage whatsoever, direct or consequential. And it is very clear that the shame and mental anxiety and suffering or indignation consequent on such a wrong, are not capable of money measurement. No one would avow in advance that he would be willing for a given time to meet that experience, and no one who should seek it as a means of putting money into his pocket, would be likely to receive compensation at the hands of a jury. So a person who is struck down by a blow from the arms of a windmill may be much more seriously hurt than by a blow from a fist or whip. But no one would dream of comparing these injuries by their physical effects. When the law gives an

* We are indebted for the report of this case to our valued correspondent at Detroit, Mr CHANEY, by whom the opinion of the court has been slightly condensed, and side-heads thrown in for convenience of reference.—[ED. C. L. J.

action for wilful wrongs it does it on the ground that the injured person ought to receive pecuniary amends from the wrong-doer. It assumes that every such wrong brings damage upon the sufferer, and that the principal damage is mental and not physical. And it farther assumes that this is actual and not metaphysical damage, and deserves compensation. When this is once recognized, it is just as clear that the wilfulness and wickedness of the act must constitute an important element in the computation, for the plain reason that we all feel our indignation excited in direct proportion with the malice of the offenders, and that the wrong is aggravated by it. If actual damage is not confined to pecuniary consequences, and can not be measured by a money standard, all redress in damages must partake of a punitory character to some extent, and the line between actual and what are called exemplary damages can not be drawn with much nicety. In every such case the jury are compelled to determine from their own sense of justice and their knowledge of human nature, what the amount of damages should be. When the amount to be recovered, must in all cases rest in their fair and deliberate discretion, the law can give them no precise instructions. It aims to do justice by directing them to distinguish between provoked grievances and those which are unprovoked, or for which the provocation is in great disproportion to the wrong; making adequate compensation in all cases, but giving heavier damages in all cases where the wrong is aggravated by bad motives or malice. It would be of very little use to present the law to a jury upon any theoretical basis. The rule is intelligible and has not been found to work badly in practice. But whether this rule involves merely compensation, or whether it is based on a theory of punishment, is not very important in practice, and does not come within the domain of law, so long as the jury are obliged to estimate by their own good judgment.

Damages—Malice in Aggravation.—It is not in Michigan an open question that damages are to be given not only for grievances beyond pecuniary losses, but also in accordance with the malice or want of malice of the offender. In Page v. Mitchell, 13 Mich. 63, it was held that for a personal injury it was not necessary to aver or prove special damages, and that without such averment or proof the jury should give such general damages as in their opinion was just under the circumstances. See also, Johnson v. McKee, 27 Mich. 471; Josselyn v. McAllister, 22 Mich. 300, and 25 Mich. 45. The doctrine that want of malice may be shown in mitigation to prevent the aggravation of damages is recognized in Farr v. Rasco, 9 Mich. 353; Huson v. Dale, 19 Mich. 17; Allison v. Chandler, 11 Mich. 542; Kreiter v. Nichols, 28 Mich. 649; Ganssley v. Perkins, MSS. opinion; Detroit Daily Post Co. v. McArthur, 16 Mich. 447. The general doctrine concerning the aggravation of damages by willful and wanton misconduct, and the powers and duties of jurors in actions of tort, is further illustrated in Tefft v. Winsor, 17 Mich. 486; Warren v. Cole, 15 Mich. 265; Brushaber v. Stegemann, 22 Mich. 266; Swift v. Applebone, 23 Mich. 252; Leonard v. Pope, 27 Mich. 145: Shealhan v. Barry, 27 Mich. 217.

Damages—Excitement in Mitigation.—The law in its application to this subject takes full account of the infirmities of human nature, and holds no one to any impossible or unreasonable standard. But on the other hand, it can not, for the safety of society be tolerated that any one can claim exemption from responsibility by reason of excitement, when his anger is unreasonable and results from a neglect to use ordinary self-control. No one has the right to allow his temper to become uncontrollable. Voluntary intoxication is held to be no excuse for crime, because every one knows what drunkenness may lead to, and such crime is not, therefore, the mere result of the temporary unsoundness of mind. Roberts v. People, 19 Mich. 401. The danger of unbridled passion is quite as obvious, and where provocations are laid up and acted on after there has been ample time for reflective self-control, the use of violence without any further adequate cause, can seldom be regarded as lacking in malice, and as not aggravated by it. If the assailant is not actually impelled by it, it can not, of course, be regarded as a motive for an act into which it did not enter.

Damages—Measure of.—In cases like this, where all the surroundings are before the jury, and where the damages are so largely discretionary, it would be utterly impossible to fix any very precise rules to guide the jury. Beyond such cautions as may guard them from allowing scope to prejudice and passion, any specific rules would hardly be rules of law in most cases, and experience has shown they have so little effect on juries that it is questionable whether they understood them. There are no cases in which more respect is paid to the general sense of jurors as representing what may be regarded the common sense of ordinary men in similar facts, and the law has been allowed to rest on this discretion as quite as likely to do justice as any other standard. It is sometimes abused, but its average working is not unjust. Arbitrary rules could hardly fail to be mischievous.

AFFIRMED, WITH COSTS.

Railway-Aid Bonds—Want of Power to Issue.

JOSEPH SHERRARD v. LAFAYETTE COUNTY.

United States Circuit Court, Eastern District of Missouri, April 27, 1875.

Before Hon. JOHN F. DILLON, Circuit Judge, and Hon. ARNOLD KREKEL, District Judge.

By an act of the legislature of Missouri, a company was incorporated, with power to construct a railroad from the town of Louisiana, which is situated on the Missouri river, *north* of the Mississippi river, *to* a point on the Missouri river, and the county court of any county in which *any part of the route* of said road should lie, was authorized to subscribe stock to the company, without a vote of the people. Afterwards the new constitution of Missouri went into effect, prohibiting the general assembly (1), from creating corporations by special act, except for municipal purposes; (2), from authorizing any county, etc., to become a stockholder in, or loaning its credit to, any company, association or corporation, unless two-thirds of the qualified voters should assent thereto. Subsequently to this, the legislature passed an act purporting to amend the charter of the said railroad company, which provided that the county court of any county in which any part of the line of said railroad might be located, might subscribe to the stock of said company and issue bonds, etc. Under this act, the County Court of Lafayette County, a county lying wholly *south* of the Missouri river, issued, without a vote of the people, the bonds from which the coupons here sued on were detached, and several installments of interest had been paid on them: *Held*, 1. That the amendatory act from which authority to issue these bonds is claimed, is a *special* act, in effect creating a new corporation, and is hence inhibited by the state constitution; 2. That it was not competent for the legislature, by extending the route of the proposed road beyond the point designated in the original charter, to authorize a county *south* of the Missouri river, to incur indebtedness in aid of the road, without a two-thirds vote as required by the constitution. 3. That, since there was an entire want of power to issue the bonds, they were void even in the hands of innocent purchasers. 4. That the fact that the county court had paid interest on these bonds, did not estop it from afterwards setting up their invalidity.

This action was brought by the plaintiff against the county of Lafayette to recover on coupons from certain bonds issued by that county. The bonds are payable to the Louisiana and Missouri River Railroad Company, or bearer, and contain the following recital, viz.: "This bond being issued under and pursuant to an order of the County Court of Lafayette County, and by authority of an act of the General Assembly of the state of Missouri incorporating the Louisiana and Missouri River Railroad Company, and authorizing the county courts of counties through which said road passed, to subscribe to the capital stock of said railroad company, and to issue bonds of such counties in payment of such subscription, approved March 9, 1859, and an amendatory act thereto, approved March 14, 1868." Trial by jury was waived, and the facts were presented to the court by the admissions in the pleadings and by the stipulation of the parties.

Ewing & Smith and *White*, for plaintiff; *Graves & Rathburn*, for defendant.

*We are indebted to Joseph Shippen, Esq., for this opinion, by whom it was taken down and reported.—[ED. C. L. J.

DILLON, Circuit Judge, orally rendered the opinion, in substance, as follows:

The bond recites as the authority under which it was issued, the act incorporating the Louisiana and Missouri River Railroad Company, approved March 10th, 1859, and an amendment thereto, approved March 24th, 1868. The former act creating said company, provided (section 35), as follows: "Said company shall have power to mark out, locate and construct a railroad from the city of Louisiana, in the county of Pike, by way of Bowling Green, in said county, to some suitable point on the North Missouri Railroad, intersecting said road between the southern limits of the town of Wellsburg, in Montgomery county, and the northern limits of the town of Mexico, in Audrain county; thence *to* the Missouri river to the most eligible point on a line the most suitable and advantageous." By the 29th section it is provided "that it shall be lawful for the county court of any county in which *any part of the route* of said railroad may be, to subscribe to the stock of said company," etc.

This act was passed prior to the adoption of the new constitution of 1865 of the state of Missouri, and authorized a subscription of stock and an issue of bonds to pay the same, without any vote of the people. This power survived the adoption of the said constitution, notwithstanding its requirement of a two-thirds vote for such purpose, as has been repeatedly held by the Supreme Court of Missouri, as well as by this court.

The defendant's answer sets up that Lafayette county is located *south* of the Missouri River, and not on the line of said railroad as originally chartered. By its charter the route of the road was confined to the north of the river. No vote whatsoever was ever had relative to these bonds. These facts are fully admitted by the parties.

The bonds bear date June 9th, 1869, which was after the adoption of the new constitution containing the following provisions:

Art. VIII, sec. IV. "Corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes."

Art. XI, sec. XIV. "The general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

The legislature passed this amendment, above mentioned, in 1868, subsequent to the adoption of the constitution, giving thereto the following title, viz.:

"An act to amend an act entitled an act to incorporate the Louisiana and Missouri River Railroad Company, by increasing the amount of the capital stock of said company, defining more explicitly the power of the board of directors, to fix the western terminus of said road, authorizing the location and construction of a branch road, and conferring upon said board the necessary powers to carry into effect the several objects contemplated by this charter, and also by striking out section 11, 18, 27, 30 and 31 of said act." Approved March 24, 1868.

This is clearly a *special* act, and, if it incorporates a new company, it is admitted to be void. The question of its validity has already been before the Supreme Court of Missouri, in a case entitled State *ex rel.* v. Saline County Court, 51 Mo. 350. The judges disagreeing, a distinguished and learned member of the bar, John R. Shepley, Esq., was, under a provision of law in force in this state, selected to act as special judge in the case. He reached the conclusion that said act of 1868 was void, because it did not *amend* the old charter, but created virtually a *new* company, and hence was in contravention of the constitution. Justice Wagner, being of a contrary opinion, held that although the amendment was void in part, yet it was not wholly so, and he deemed the title an essential portion. These two judges differing, Judge Bliss concurred with the special judge. The court, however, did decide that even if this act of 1868 had any validity, it could not authorize the company to construct its railroad or to receive municipal aid *south* of the Missouri river. This it undertook to do by its section 20, which is as follows: "It shall be lawful for the county court of any county in which any part of the line of said railroad may be located, to subscribe to the stock of said company, and issue the bonds of the county to raise funds to pay the stock thus subscribed, said bonds to bear interest not exceeding ten per cent., payable semi-annually, and to take proper steps to protect the interests and credit of the county."

Thus the legislature attempted to carry into this amended charter the power conferred by the original to subscribe without a popular vote, and this we decide it could not do.

These bonds in suit are negotiable, and are in the hands of a purchaser for value; and it is now the well-settled law, that where a municipal or public corporation has the power to subscribe stock and issue its bonds in payment thereof to aid in the construction of a railroad, no defence can successfully be made against such a purchaser. As against him the sole defence is the want of power. The question is thus reduced to the narrow limits, whether or not Lafayette county had the power to issue these bonds. If it had, it must pay; but if it had not, the plaintiff can not recover.

It is stipulated and agreed herein that there was no power conferred by the original charter, and that Lafayette county is geographically located on the south side of the Missouri river. We hold that the purchaser is bound to know whether the county making the stock-subscription, and issuing its bonds, is a county in which any part of the route prescribed for the railroad lies. For if it matters not whether the county is within such limits, then Cole county or Dade county, 100 or 200 miles distant, might be held to have equal power under the charter.

The bond recites the act of 1868, and if that gives the power under any circumstances, the defendant is bound. Had section 20, above quoted, said that a vote was necessary, and such a vote had been recited in the bond, a different case might be presented.

The act of 1868 undertakes to authorize counties to issue bonds without a vote, which before had no such authority. The original charter authorized it, and this purports to be only an amendment. Such is the theory presented by the recitals of the bond. No power is here derived from the old charter; it arises from the amendment, if at all. Our judgment, reached with considerable hesitation, is that this power did not exist. No power outside of these acts is stated in the bonds or relied on by the plaintiff, and we decide there was none in them. The original charter of 1859 authorized counties along the line of the railroad to subscribe stock and issue bonds, but this power did not extend south of the Missouri river, either by said charter or the amendment thereto.

Several payments of interest have been made on these bonds from funds derived from taxation, but this can make no difference. In the recent Topeka and Iola Cases (2 CENTRAL LAW JOURNAL, Nos. 10 & 11, 1875), the Supreme Court of the United States decides that want of power can not thus be cured. Such corporations may, by their acts, become estopped from defences based on irregularities of their officers, but want of power is an inherent defect not subject to estoppel in this manner.

KREKEL, J., concurs.

JUDGMENT FOR DEFENDANT.

—DEATH OF A VENERABLE JUDGE.—The Hon. Willard Hall, for forty-eight years judge of the United States District Court of Delaware, died on Thursday 13 inst. at Wilmington, in his 95th year. He was born at Westford, Mass., in December, 1780, and graduated at Harvard College in 1799, being one of the three or four oldest surviving graduates of that college. In 1803 he removed to Delaware, was elected to Congress in 1816 and 1818, and in 1823 was appointed by President Monroe, judge of the United States Court. He revised the state code in 1829; and drafted the school system in 1830, and was an active member of the constitutional convention of 1831. In December, 1871, being then in his 91st year, he resigned his judgship. In his death a long and useful life is ended.—[*The Legal Chronicle.*

Patent Law—Infringement Measure of Damages.

JOSEPH INGELS v. PHINEAS P. MAST.*

United States Circuit Court, Southern District of Ohio, February, 1875.

Before Hon. H. H. EMMONS, Circuit Judge, and Hon. PHILLIP B. SWING, District Judge.

1. **Improvement—Infringement—Damages.**—Where the patent on which the recovery is based, is for a combination, the complainant may recover simply for the value of the improvement or element that he has added to what was before old.

2. **Case in Judgment.**—The recovery here being upon a claim for a seed-cup for grain drills, combining the concave hopper, the seed wheel turning therein; having projecting cogs, the elevated delivery and the cheeks or the bosses for the wheel to turn against, and the master having giving the profit on the whole combination, but it being shown in the original case, that the inventor simply added cheeks to a combination of the other three parts before old: *Held*, that the report must be set aside, and a new account taken on the question, how much more profit did defendant make by using the whole combination, than he would have made had he omitted the cheeks.

Hearing on exceptions to Master's Report.

The opinion of the court on the question of infringement is reported in 6th Fisher, p. 416. The court there held that complainants' patent was for a combination of four elements, a seed cup for grain drills having (1), a concave hopper; (2), a seed wheel turning therein, with projecting cogs, to draw forward the grain; (3), an elevated delivery orifice, so as to make the drill forced feed; and (4), cheeks or bosses between which the wheel turned. It held that the Strayer patent, earlier in date than that on which the suit was brought, showed all these except the last, to-wit, the cheeks. The Master reported damages to the amount of nearly $20,000, upon a basis of a license fee, for the whole combination covered by the patent in suit, and others. There was also other testimony in the record, to show the value of the whole combination. To this report exceptions were filed.

On the hearing complainant contended, that under the decision of Judge Grier, in Livingston v. Jones, 2 Fisher —, and other decisions, they were entitled to the profit on the entire combination, while respondents claimed that under the rule in many cases, finally settled in Whitney v. Mowry, 16 Wallace, complainant could recover only for the additional profit that he had made by using the whole combination, over what he might have made by using all except the cheeks, the only thing Ingels added to the combination of Strayer. And as complainant had rested his case, without thus apportioning the profits, he was entitled to recover nominal damages only. To support the latter proposition, complainants referred to Wayne v. Holmes, 2 Fisher, 30; Ransom v. Mayor of New York, 1 Fisher, 275; Poppenhusen v. New York Gutta-Percha Comb Co., 2 Fisher, 73; Goodyear v. Bishop, 2 Fisher, 159; Carter v. Baker, 4 Fisher, 419; Swarzel v. Holenshade, 3 Fisher, 116; Graham v. Mason, 5 Fisher, 290; Curtis on Patents, 4th edition, pages 458 to 461; City of New York v. Ransom, 23 Howard, 487; Jones v. Moorhead, 1 Wall. 155; Seymore v. McCormick, 16 Howard, 480; Mowry v. Whitney, 14 Wall. 620; Philp v. Nock, 17 Wall. 460; Whitmore v. Cutter, 1 Gallis. 478; and Burdell v. Denig & Ide, 2 Fisher, 595.

The court did not deliver a full opinion, but gave simply its conclusions.

Wood & Boyd, for complainant; *Hatch & Parkinson*, for defendant.

EMMONS, J.—1. The testimony, when analyzed, does not show any certain basis upon which the finding of the Master can rest. No one witness swears to any license fee which is applicable to the precise thing here used, and for which damage is claimed. There is no claim that the report of the Master is warranted by any proof of profits.

2. Subject to reconsideration when the Master's further report comes in, it is suggested that the proper measure of damages is the difference between the value of the improvement used by the defendant, and any other like device which was open to him without royalty, or by payment of a less royalty. This is said notwithstanding the suggestion in Judge Grier's decision in Livingston v. Jones, 2 Fisher, that there is no warrant for subdividing the elements in an improvement and giving the complainant the value only of that peculiar feature in it which he has added. He seems to argue that the portion of the device which is improved, must be taken as a unity, and the complainant entitled to its whole value as improved. We rule for the present, on the contrary, that he is entitled only to the value of that which he has added, and that such a subdivision should be made (see 1 Wall. Jones v. Moorhead), which although not deciding the question of damages, modifies Judge Grier's doctrine of unity.

3. The Master will, however, make an additional report, upon the basis that the complainant is entitled to damages for all the profits which the defendant has made by the use of the improved cheeks described in the patent. This, as distinguished from the rule which would confine him to the difference of the value of the cheeks, and such as he might have used without royalty.

It will be recommitted to the Master to make a further report in accordance with these views.

ORDERED ACCORDINGLY.

* For the report of the above case, we are indebted to Messrs. Hatch & Parkinson of Saint Louis, Solicitors of Patents, and editors of the last volume of Fisher's Patent Cases.

Limitation of One Year as to Application for Discharge in Bankruptcy.

IN RE LOWENSTONE.

United States District Court, Eastern District of Missouri, May, 1875.

Before Hon. SAMUEL TREAT, District Judge.

The limitation of one year in § 5108 of the Revised Statutes (old § 29), was not repealed by the act of 1874; and a party, who was not entitled to his discharge prior to the act of 1874, can not claim that fact as an excuse for his failure to apply for his discharge within the year, and avail himself of the less stringent provisions of the amended act.

TREAT, J.—Early in 1872, Lowenstone, was, on his own petition, adjudicated a bankrupt. Under the act of Congress, as it then stood, his application for discharge should have been made within a year. He coul'd not procure the needed assent of his creditors; and knowing that fact, he made no application.

Subsequent to the act of 1874 he proceeded to procure the assent of the smaller number designated by that act, then filed his petition for discharge, and had the same, in the usual course of business, referred to the register.

At the meeting of creditors, called for the purpose, some of the creditors entered opposition, and filed specifications based on supposed frauds by the bankrupt, and also upon alleged fraudulent representations, by means of which the assent of creditors was procured.

The first enquiry is as to his right, after the year, to be heard at all. Judge Dillon, *in re* Donaldson, held that the limitation of the act was not absolute; but that the bankrupt, if satisfactory excuse was shown for failure to apply within the year, might make his application subsequently. That decision was made before the recent amendments.

It would be no valid or satisfactory excuse to show that he could not procure the legal assent of his creditors; for if that assent was not to be had, he could not be discharged; and therefore the excuse would be simply that he was not entitled to his discharge.

But it is now urged that, not having applied at all, for the reason stated prior to June, 1874, the recent amendments entitle him now, on an application since filed, to the more favorable terms

prescribed by those amendments, despite the limitation of one year.

To so rule, would be to hold that the act of 1874 repealed the limitation of one year, although nothing to that effect appears in the amendatory act. That limitation is still in force in all cases to which it applies. A voluntary case, instituted since that act, is within the year rule. There is nothing repealing, or rescinding it, either as to past or future adjudications.

Had the bankrupt applied within the year, and his application been pending when the amendments went into effect, a difficult proposition might have arisen as to the rule to govern such a case. But the question under consideration does not fall within such an enquiry. It is merely whether a bankrupt in 1872, who, knowing he could not comply with the acts of Congress which limited him to one year, which limitation still continues, can now, despite said limitation, claim discharge on the sole ground that now, under the new statute, he can do what he could not have done before the new statute was passed.

The difficulties are insurmountable. It can not be held that the amendments were designed to do what they do not do expressly or impliedly. The limitation in question has not been altered or removed. The excuse offered is not within the letter or spirit of the decision in *re* Donaldson.

The court rules that the bankrupt is not entitled to his discharge on the facts presented, and his application is refused at his costs.

ORDERED ACCORINGLY.

Correspondence.

ACTS OF INFANTS, VOID AND VOIDABLE.

LANSING, MICH., May 15, 1875.

EDITORS CENTRAL LAW JOURNAL:—In reply to the communication of "Enquirer," printed in your issue of April 30th (p. 288), I would suggest that the words used in the article referred to, were, "will prevent any *un*-necessary injury to third parties dealing with him."

The expression was used simply *arguendo;* and it was not intended thereby to convey the impression that the rule there stated would prevent *all* injury to third parties dealing with infants, but only the unnecessary injury caused by enlarging the list of contracts absolutely void and incapable of confirmation by anything short of a new contract on a new consideration, notwithstanding the fact that the infant might not desire to repudiate the same. In the article referred to, the 5th line should read "grants or deeds made by infants which do not take effect by delivery of his hand, are void." Respectfully,

M. D. EWELL.

LANGDEAU V. HANES, AGAIN.

TRINIDAD, COLORADO, May 15, 1875.

EDITORS CENTRAL LAW JOURNAL:—From your four last issues (*ante*, 229, 231, 288, 304), it seems to me that both editors and correspondents wholly misunderstand the *leading* case of Langdeau v. Hanes. I was counsel for plaintiff in that case, from its commencement to its termination, and think that a better acquaintance with the history and authentic records of French, British, commandant and court deeds, and all Virginia titles to lands in the northwest territory, at the time Virginia ceded that territory to the United States, would have led to wholly different conclusions by the learned court,—which I understand to be, *first*, that the title to the land in question never was in the United States; *second*, that if the confirmation of 1807 was of a certain quantity of land then undefined and incapable of indentification, the title became perfect when the quantity was surveyed in 1820. With great respect for the high tribunal that announced these conclusions, I wholly dissent from both propositions, upon principles taught by that court and thought to be settled.

Before entering into a brief analysis of the two points decided in Langdeau v. Hanes, it is necessary to fully understand the authentic history of these titles, which the learned court, in the hurry and dispatch of the multitude of case before it, wholly mistake or altogether overlook, in arriving at the first conclusion, that is, that these titles were so far perfected under the laws of Virginia, and her deed of cession to the United States, as to cut off and prevent the fee from vesting in the United States, and thus let in the limitation laws of Illinois to destroy plaintiff's title. From the records of the general land office and the legislation of Congress, based on these *authentic* sources of information, we get a full history and correct comprehension of the nature of these titles, and to that source we confine ourselves.

Congress at an early period was in possession of a large amount of information disclosing the invalidity of these French, British, court, commandant and assumed Virginia titles to lands in the ceded territory. The committee on private land claims, 11th Congress, second session, in their report say: "*These grants and commandant deeds, or concessions have always been held as possessing no validity;* but that it has been provided by Congress, that where lands have been improved and cultivated under a *supposed grant* of the same, by commandant or court claiming authority to make such grant, the person making the improvement shall be confirmed in whole or part, as the case might be, not exceeding 400 acres." Vol. 2 Am. St. Papers, p. 105–6, 7.

The inhabitants of the district of Vincennes themselves never claimed that they had a perfect claim to these lands in virtue of these titles. In 1790 Winthrop Sargent, then secretary of the northwest territory, and acting governor of the same, and as such ex-officio commissioner to enquire into, and pass upon these titles, called upon the inhabitants of Vincennes for a statement touching the origin, nature and validity of these titles in order that he might the better discharge the duties devolved on him by Congress, in discharging the duties which the deed of cession imposed on the United States. In reply, the inhabitants say: "As you have given verbal orders to the magistrates who formerly composed the Court of the District of Post Vincennes, under the jurisdiction of the state of Virginia, to give you their reasons for having taken upon themselves to grant concessions to lands within the district, in obedience thereto, we beg leave to inform you that their principal reason is, that since the establishment of this country, the commandants have always appeared to be vested with powers to give lands and lots. Mr. Legras was appointed commandant of Post Vincennes by the lieutenant of the county, and commander-in-chief, John Todd, who was in the year 1779 sent by the state of Virginia for to regulate the government of the country, and who substituted Mr. Legras with this power. In his absence Mr. Legras, who was then commander, assumed that he had, in quality of commander, authority to give lands according to the ancient usages of other commanders, and he *verbally informed the court* of Post Vincennes, that when they would judge it proper to give lands or lots to those who should come into the country to settle or *otherwise*, they might do it, and he gave them permission to do so. These are the reasons that we acted upon, and if we have done more than we ought, it is on account of the little knowledge we have of public affairs." Vol. 1 American State Papers, Tit. Public Lands, p. 11, Green's Edition.

This explanation of the origin and source of these titles by the parties in interest at the time they were undergoing official investigation, is copied by Mr. Sargent in his report to the secretary of the treasury, dated the 31st of July, 1790, as commissioner of public lands in the northwest territory. But Mr. Sargent in this same report still more forcibly demonstrates the utter invalidity of these claims as perfect titles. He says: "The original concessions of the French and British commandants were generally made upon small scraps of paper, which it has generally been customary to lodge in the notary's office, who has seldom kept any book of record, but committed the most important land concerns to

loose sheets, which in process of time have come into the possession of persons that have fraudulently destroyed them, or, unacquainted with their consequence, have innocently lost or trifled them away." Ibid., pp. 5–6.

A further history of these titles by the inhabitants themselves may be found in the archives of the general land office, in a letter addressed to President Washington in 1793, acknowledging that they had no valid title to these French, British, court and commandent deeds or grants, but thowing themselves wholly on what they term the equity of the United States, thus placing themselves and their titles upon the true and only ground on which the government could concede any claim. See Vol. 1 American State Papers, Tit. Public Lands, p. 26, Green's Edition. President Jefferson, who was one of the commissioners who signed the deed of cession from Virginia to the United States, and who was as eminent for his legal abilities as he was for his abilities as a statesman, called the attention of Congress in 1802, to the gross frauds then being perpetrated on the public lands in the Indiana territory (which at that time embraced the territory now included in the state of Illinois), in virtue of these claims to land. See American State Papers, Vol. 1, Tit. Public Lands, p. 111, Green's Edition. Winthrop Sargent in his official report already referred to (p. 5), says: "*There is scarcely one case in twenty where the title is complete.*"

On the 31st of December, 1809, Jones and Backus, who were commissioners in the adjoining District of Kaskaskia, say of these titles in their official report to the secretary of the treasury: "The commissioners are satisfied that no grants made during the continuance of the British government in this country, either by its officers, or by the Indian titles, were either authorized or sanctioned by it. The known regulations of the British government, the proclamation of General Gage, of 1773, and that of the King of Great Britian, of the 7th of October, 1763, are, we think, decisive upon this point. With respect to the French grants, from the wanton outrage which has been committed on their records by the British officers and others, it has been rendered impossible for the present claimants, generally, either to produce the concession to the concedees, under whom they claim, or a regular chain of conveyance from them." See American State Papers, Vol. 2, Tit. Public Lands, Gale & Seaton's Edition, pp. 105–6. In this same report these commissioners say: "The whole history of Illinois goes to prove, that at first, the officers of the India company united with officers of the crown, and after the dissolution of the said company, the officers of the French crown alone possessed competent authority to issue concessions for land in it." * * * "We are induced to believe that during this period titles were usually *commenced* by a concession from these officers, that they were then considered as in an *inchoate state, dependent for thier consummation* on the sanction of the Governor General of Louisiana, the Council of the Indies, or the French crown." Ibid., p. 189.

These citations are all from the record of the general land office, published by authority of Congress, and import absolute legal verity. They are evidence of the facts stated, in the courts of the United States, wherever applicable. We might multiply these citations until we wearied the patience of the reader, but enough has already been shown from these authentic sources to indicate, in unmistakable terms, the inchoate character of these titles when Virginia ceded the territory to the United States, and that the *legal title* to these lands never passed from France, Great Britian or Virginia, to the claimants—that the United States did take the fee to the soil charged only with an equity at most.

It was well known to Congress that but few of these unrecovered paper concessions, emanating, as all of them did, from an illegal source, had ever been located anywhere on the face of the earth; that they were passed from hand to hand, without any written transfer or endorsement, like bank bills. But notwithstanding these inherent infirmities in these titles, Congress in the exercise of its supreme control over the public domain, set apart a scope of country more than fifty miles square, in which all of these claims, favorably reported upon and confirmed, might be located. And the claim of the heirs of Tongas falls entirely within this *unlocated* class. The commissioners report it as *an unlocated claim for 204 acres of land;* and this fact clearly appears in the record in Langdeau v. Hanes. And the act of March 3d, 1807, which confirms this claim (2 Statutes at Large, p. 446 section 4), provides "that the several persons whose claims are confirmed by this act, and had not been actually located prior to the establishment of the board of commissioners, be, and they are hereby authorized to enter their locations with the register of the land office of Vincennes, *on any part of the tracts set aside for that purpose, by virtue of the act entitled 'an act respecting the claims to lands in the Indiana territory and state of Ohio,' and in conformity with the provisions of that act.*" Section 5 provides, *that whenever the claim shall have been located and surveyed*, the party shall be entitled to a patent certificate and patent.

The claim was not located and surveyed until 1820, and the patent did not issue until July, 1872. Now, if the fee to this land, never vested in the United States, as the learned court decides, will some legal gentleman please tell me, *first*, what authority the United States had to designate a scope of country more than fifty miles square, and compel the location of this 204 acre float anywhere in the prescribed limits; *second*, if it was never in the United States, will he tell me where the fee was up to the location and survey in 1820. It could not be in France; for she had parted with all dominion and sovereignty over the soil. It could not be in Great Britian; for she had done likewise. It could not be in Virginia; for she had ceded the territory to the United States, and all dominion over it, subject, at most, to this vague, undefined and unlocated claim, which could not attach to any specific soil before location. It could not be in plaintiff's ancestors; because the fee can not attach before the location and boundaries are fixed. Until this question is answered, I shall be of opinion that the fee was somewhere, and that it was in the United States. It is no answer to my query to say that Virginia stipuluted in her deed of cession, "that the French and Canadian inhabitants, and other settlers of the Kaskaskies, St. Vincents, and the neighboring villages, who have professed themselves citizens of Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties." I can see no possible distinction in the acceptance of a deed of cession, with this reservation or stipulation on its face, and that of a treaty with a foreign power with the same reservation or stipulation.

The treaty of Paris, made in 1803, by which we acquired the vast territory of Louisiana, contained the same stipulation respecting the titles of the inhabitants; and on the same day (3d of March, 1807), that Congress confirmed the title in the dispute in Langdeau v. Hanes, it confirmed claims to lands in the territories of Orleans and Louisiana (see 2 vol. Stat. at Large, p. 440), to carry into effect precisely the same obligations imposed by the treaty, which are imposed by the deed of cession from Virginia. The second section of this act, provides that all persons, who, on the 20th of December, 1803, have, for ten years prior thereto, been in possession of a tract of land, not claimed by any other person, and not exceeding 2,000 acres, and who were on that day resident in the said territories, "*shall be confirmed in their titles to such tract of land,*" provided that no more land shall be granted by virtue of this section than is actually claimed by the party, nor more than is *actually contained within the acknowledged and ascertained boundaries of the tract claimed.*

This section contains much stronger terms of *present grant*, than anything to be found in the Vincennes act. The sixth section provides for the issue of a patent for the land, just as the Vincennes act provides. In Burgess v. Gray, 16 Howard, 48, it was contended that the act, *proprio vigore* passed the legal title, and that a patent was not necessary to convey the fee from the United

States; but the court, Chief Justice Taney delivering the opinion, held that the whole act must be construed together, that the act of confirmation provided for a patent which was necessary to pass the title of the United States. The same doctrine was again announced in West v. Cochran, 17 How. The Supreme Court of the United States have often held, that in all cases of incomplete titles to land acquired by the United States, by treaty, conquest, or cession, the legal title vests in the United States, and that it rests with Congress to indicate to whom the fee shall be given. Lesbois v. Brunt, 4 How. 449; Chouteau v. Eckert, 2 How. 344; McGuire v. Tyler, 8 Wal. 650; Menard's Heirs v. Mussey, 8 How. 293. And these cases, so far as they relate to the point under consideration, are all overruled by Langdeau v. Hanes, unless there is some magical distinction, never before disclosed to the profession, between a deed of cession and a treaty containing the same stipulation. In Langdeau v. Hanes, Bagnell v. Broderick, 13 Peters, 436; Fenn v. Hume, 21 How. 481; Wilcox v. Jackson, 13 Peters, 498, were all cited by plaintiff's counsel in connection with Gibson v. Chouteau, 13 Wallace, 96, in support of the doctrine enunciated in all of these cases, that the states have no power to pass limitation or other laws divesting the title to lands derived through the United States before the fee is passed, and not that there is any other similarity between a claim founded on a New Madrid location, in which the fee is confessedly in the United States until it is passed by them, and a claim originating or having its inception under the laws of some other power than that of the United States. Gov. Kœrner's attempted explanation of the non-relation between Langdeau v. Hanes and Gibson v. Chouteau, implies a dullness of comprehension amounting to folly on the part of counsel for plaintiff, which could never be reached short of an insane asylum. The position which his explanation implies, was never assumed by plaintiff's counsel, either in the circuit or supreme court, or anywhere else. I owe this explanation to the Governor, that I may not so innocently forfeit his good opinion, and to the profession that they may not be so innocently misled by him, in a cause which draws about it so much borrowed light.

I now briefly pass to the doctrine hypothetically stated, and decided by the court in the second point; that if the confirmation was of a certain quantity, then undefined and incapable of identification, the title became perfect when the quantity was surveyed in 1820. In other words the doctrine of relation is applied in aid of a *stranger* to the title, in aid of whom a fiction of law is resorted to by the court to defeat the acknowledged legal title, by letting in the statute of limitations to cut it off. This is certainly as new as it is a strange doctrine, and it reverses and overrules the doctrine enunciated by the same learned judge, in Gibson v. Chouteau (*supra*), and Lynch v. Bernal, 9 Wal. 315. In Gibson v. Chouteau the Supreme Court of Missouri is reversed for applying the doctrine of relation in aid of a *stranger*, so as to let in the statute of limitations to cut off the acknowledged legal title, precisely as it is now applied in Langdeau v. Hanes. I quote from the learned judge who delivered the opinion in both cases. In speaking of the error of the Supreme Court of Missouri, the court say: "The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title. The defendants in this case were strangers to that party and his equitable claim, or equitable title as it is termed, not connecting themselves with it by any valid transfer from the original, or any subsequent holder." In Lynch v. Bernal, 9 Wal. 325, the same learned judge, speaking of the doctrine of relation, says: "That doctrine is applied only to subserve the ends of justice, and to protect parties deriving their interest from the claimant." In Langdeau v. Hanes the defendant relied solely on the limitation laws of Illinois, and set up no title or claim whatever through the heirs or confirmees of the land in question.

The question is an important one, and I hope that it will be more fully and thoroughly examined than it has been by the profession.

JOHN HALLUM.

Notes and Queries.

CONDITIONAL SALE—PROMISSORY NOTE—ANSWER TO W. M. Q.

LOUISVILLE, KY., May 18th, 1875.

EDITORS CENTRAL LAW JOURNAL:—In reply to W. M. Q. (*ante*, p. 323), I would cite you to the case of R. W. Vaugh & Ricketts v. John Hopson, recently decided by the Kentucky Court of Appeals. One Hull purchased a mule from appellee for $175.00, for which he executed his note on the following condition annexed, viz.: "This note is given for a mule, and the mule is bound, or the title to remain in Hopson until he gets his money." The mule passed by sale into the hands of a *bona fide* purchaser; and the question presented was, "Can a *bona fide* purchaser from the first vendee, and without notice of the lien or reservation of title in the vendor, hold title against the latter?" It was held that he can. This case overrules the old case of Patton v. McClean, 15 B. Mon., which held directly the opposite doctrine.

WM. E. M.

DEVISE—SALE BY HEIR——RIGHT OF CREDITOR—ANSWERS TO "B."

INDIANAPOLIS, IND., May 19, 1875.

EDITORS CENTRAL LAW JOURNAL:—In answer to the "query" put by "B." (*ante*, p. 323), I would say:

1. As A.'s will imperatively directs the sale of his real estate, and the equal distribution of the proceeds among his seven heirs, the real estate becomes, on the death of A., impressed with the character of personalty.

2. Until the seven heirs shall unite in the election to change the character thus impressed on such real estate, and to take it in its original character, all the interest that B., as one of the seven heirs, can be said to have is an interest in the execution of a trust; he has no interest in the real estate as real estate.

3. The deed made by B. to C. of an undivided one-seventh part of the real estate, made as it is in the absence of such an election by the seven heirs, and before the real estate is sold by the executor in the execution of his trust, fails of effect at law because of B.'s want, at the date of the deed, of a vested interest in the real estate it purports to convey; and it certainly can not be of such avail in equity,—viewing it in the light of an executory agreement to convey,—as to entitle C. to B.'s share of the proceeds of the sale; for any such after-acquired interest by B., as can in equity be made to inure to the benefit of C. in virtue of the deed, will have to be an interest in what appears on the face of the deed to be the thing conveyed—an interest in the real estate itself.

U. J. H.

SPRINGFIELD, ILLS., May 21, 1875.

EDITORS CENTRAL LAW JOURNAL:—Gentlemen: In CENTRAL LAW JOURNAL, Vol. 2, No. 20, page 323, under head of "Notes and Queries," "B." desires to know the effect of a deed executed by one of the heirs of a testator purporting to convey the heir's interest in certain realty devised by the testator, who directed, in his will, his executors to sell the realty and distribute the proceeds of the sale equally among his heirs. In Baker v. Copenbarger *et al.*, 15 Ill. 103, it is decided in a case very similar, that a devise of real estate, which by the provisions of the will is to be converted into money, and that money distributed among the devisees, must be treated as a devise of money and not of lands, and that the character of the devise can not be changed from money to land without the consent of *all the devisees*. And in such case one devisee can not sell and convey a valid title to any part of the land, nor could the interest of one of the devisees be sold on execution. This is the only authority I have found on the subject. Respectfully.

J. W. P.

HUMBOLT, KANSAS, May 11th, 1875.

EDITORS CENTRAL LAW JOURNAL:—Gentlemen: We take your CENTRAL LAW JOURNAL, also many other lawyers of our district, and considerable interest generally will be found in the following query: "A." was a citizen of Kansas, and "B.," a railroad company, is also a citizen of Kansas, operating its road through Missouri, Kansas, Texas, and the Indian Territory. B. employs A. as a brakeman, at Denison, Texas, and by the negligence of B., its employes, agents, and the mismanagement of its engineers, etc., A. is killed at a point on the line of the road in the Indian Territory. The widow and personal representatives of "A." bring suit for damages for the wrongful killing of her husband, in a Kansas court. Are the rights of the parties governed by the law of the Indian Territory, where A. was killed, or the law of Texas, where the company hired him as a brakeman, or the law of Kansas, where the suit is brought?

H. D. S.

ANSWER.—The courts will presume that the common law is in force in an-

other state, and that no action can be maintained for a homicide occurring in such state, unless it is alleged that in such state that a statute exists authorizing the action. The statute of the state in which the suit is brought will not apply. Lacey's Railroad Digest, 444, citing Selma, Rome & Dalton R. R. v. Lacey, 43 Ga. 461; 49 Id. 106; Worley v. Cincinnati, etc., R. R. Co., 1 Handy (Ohio), 481; Kramer v. San Francisco Market St. R. R. Co., 25 Cal. 434; Carey v. Berkshire R. R. Co., 1 Cush. (Mass.), 475. "An administrator, appointed in this state, can not maintain an action in the courts of this state, under a statute of Illinois authorizing the personal representative of a person who comes to his death by the wrongful act or default of another, to maintain an action against such other for damages, for the benefit of the widow or next of kin of such deceased person." Syllabus, Woodward, Adm'x, v. Mich. S. & N. Ind. R. R. Co., 10 Ohio S. 121. The same was held substantially in Richardson, Adm'x, v. N, Y. Cent. R. R. Co., 98 Mass. 85. In Selma, Rome & Dalton R. R. Co. v. Lacey, 49 Ga. 106, the court held that where a widow brings suit in Georgia for damages resulting from the killing of her husband in Alabama, through the negligence of a railroad company, the court will be governed by the laws of Georgia as to the mode of procedure, but the rights of the parties must be determined by the laws of Alabama, which give the "personal representative" a right of action in such cases, and that the widow could not maintain such action. It seems, therefore, unless there should exist some law of the state where the killing took place authorizing an action for damages resulting therefrom, none can be maintained,—and that if there be such law, only the person named therein as competent to sue can maintain such action. C. A. C.

Recent Reports.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF OHIO. (OHIO STATE) Vol. 24. By E. L. DEWITT, Attorney at law. Cincinnati: Robert Clark & Co. 1875.

We are much indebted to the publishers for this very valuable volume sent to us for review. Many of the cases contained in it have been already noticed in the "Summary of our Legal Exchanges," from the advance-sheets, kindly forwarded to us by the publishers, some time since, and will be found in the following pages of the present volume: 34, 68, 82, 259 and 260. The volume is all that could be wished in style and finish, containing over seven hundred pages, and about one hundred and seventy cases, and presents one of the few instances where lawyers are fortunate in receiving the full worth of the money they so liberally invest in books; the price of these reports in the present edition and series, being only $2.50 per volume. The enterprise of the publishers in supplying the profession with so excellent a set of reports at such a price, is receiving, as it deserves, the strongest recognition and encouragement, and it is a pity that the plan of publication should not be introduced and adopted by all the states. The work of the reporter is fairly done, but we can not forbear noticing that fifteen of the cases are entirely without syllabus, and although they are short, and generally upon questions of inferior importance, yet the insertion of a syllabus, indicating briefly the points decided, could not fail to save the careful searcher after authorities, much valuable time necessarily spent in reading them. The table of cases is defective in giving only the name of the plaintiff alphabetically. It should include the alphabetical arrangement of the names of both parties. Another improvement must be suggested, viz., the employment of black-letter head lines, or catch-words, at the beginnig of each paragraph of the syllabus, indicating its contents.

Enclosure of Railroads—Cattle Running at Large.—Marietta & Cincinnati R. R. v. Stephenson, p. 48. Where a railroad running through a large field was protected at its entrance thereto by cattle guards, but had no fence along its line through the field, such railroad was held not to be fenced in accordance with the statute.—Where cattle, running at large, had broken into such field and been injured by a passing train, the owner of such cattle was not guilty of contributory negligence.

Criminal Law—Discharge of Jury before Verdict.—Hines v. The State, p. 134. The discharge of the jury without the consent of the defendant, after it has been duly impaneled and sworn, but before verdict, is equivalent to a verdict of acquittal, unless the discharge was ordered in consequence of such necessity as the law regards as imperative; and the record should show the existence of such necessity; otherwise the defendant will be entitled to discharge. See Bell and Murray v. The State, Ala. Sup. Ct., 1 CENT. L. J. 630.

Priority of Judgment against Mortgage—Commencement of Term.—Hemminway v. Davis, p. 150. The time of the commencement of a term of court is to be determined by the record of the court, in connection with the statute under which the the term is held, parol evidence not being admissible. Where a mortgage was filed for record on the first day of the term, and the record fails to show the hour at which the court met, the session of the court will be presumed to have commenced at 10 o'clock of that day, as required by the statute.

Partnerships—Payment of Private Debt by Liquidating Partner.—Corwin v. Suydam, p. 209. An appropriation of partnership assets by one partner, without the assent of his co-partners, in satisfaction or security of his private debt, in the absence of proof to the contrary, is presumed to be fraudulent and collusive, as against the other members of the firm, and may by them be set aside. This presumption, however, is not conclusive, but may be rebutted. Where the sole acting member of a dissolved partnership, with full power to dispose of its property and pay its debts, himself became a creditor of the firm, by advancing his private funds in payment of its debts, and then in good faith and with no intention to defraud the company, disposed of the property of the firm to an amount less than the sum so due to him, in satisfaction of a debt due from him to a third person, who received the same in like good faith, and in the belief that such sale was authorized by the firm: *Held*, that this disposition of the property can not be avoided by another member of the firm, it appearing that all the outside debts of the firm are paid or secured, and that there is nothing due to such other member from the firm, unless he includes in his account against it a part of the same claim of A. upon the firm, transferred by A. to him in satisfaction of a debt due to him from A.

Cited for plaintiff in error: An act done by one partner in the name of his firm, if unauthorized, may be either ratified or rejected by his co-partners, but they can not both ratify and reject the same act. They can not take the advantages and reject the disadvantages. Highway v. Pendleton, 15 Ohio, 757; Benedict *et al.* v. Smith *et al.*, 10 Paige, 127; 1 Comst. App. (N. Y.) 434; 12 Mees. & Wels. 553; 3 Story, 689; 2 Vt. 252; 6 Clark & Finnelly, 232. A partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be. Winship *et al.* v. Bank of United States, 5 Pet. 429; Gano & Thoms v. Samuel, 14 Ohio St. 582; Story Part., sec. 307 and note 1; Parsons Part., 159, 160, and note *c*, 440–442, 471–476; Collyer Part., secs. 110, 545; Horton's Appeal, 13 Penn. St. 67; Ayer v. Ayer, 41 Vt. 350; Talcott v. Dudley 4 Scam. 435, Eden v. Williams, 36 Ill. 252; Kingman v. Spurr, *et al.*, 7 Pick. 235; Marquand v. N. Y. Manuf. Co., 17 Johns. 525: Rodiquez v. Heffernan *et al.*, 5 Johns. Ch. 417; Nicoll v. Mumford, 4 Johns. Ch. 522; Cochran v. Perry, 8 W. & S. 266; Lockwood v. Mitchell *et al.* (as to rights of surviving partner), 7 Ohio St. 410; *Ex parte* Norcross, 5 Law Rep. (Boston) 124.

Cited for defendant in error: Roxborough v. Messick *et al.*, 6 Ohio St. 448.

Unincorporated Religious Society—Legitimate Succession.—Harrison v. Hoyle, p. 254 Civil courts, in determining the question of legitimate succession of an unincorporated religious society, where a separation has taken place, will adopt its rules and enforce its polity in the spirit and to the effect for which it was designed. Where public policy or the positive law of the land, is not contravened, the decisions and orders of such society, when made in conformity to its polity, should have the same effect, in civil courts, which the society intended should be awarded to them when pronounced by its own judicatories. If such society be composed of several bodies or branches, whether co-ordinate or subordinated, the rules of the society, for the management of its internal affairs, and for the adjustment of the relations between its branches, constitutes the rule by which they should be governed. This action was prosecuted to recover the possession of certain lands in Jefferson county, Ohio, belonging to the Ohio Yearly Meeting of the Society of Friends, the legal title thereto having been conveyed by the vendor thereof, to the trustees of said Ohio Yearly Meeting, to-wit, John Steet, Jacob Holoway, Benjamin Hoyle and Henry Crew, the survivor of them and the heirs at law of said survivor, forever, in trust and for the use of said Ohio Yearly Meeting of the Society of Friends, subject to any disposition which said yearly meeting might at any time make. At a subsequent meeting, the society appointed new trustees to re-convey the property to them, and directed the above-named trustees to re-convey the property to them. Hoyle refused to convey the same as directed, and undertook to convey to others whom he designated as trustees. This action resulted in a separation or division of the society into two distinct bodies, which are represented by several parties to this action. The contest, like all church quarrels, was bitter and protracted. The evidence was enormous in volume, and the space required in its report nearly eighty pages.

Insurance—Certificate of Intermediate Insurance—Authority of Agent—Notice of Additional Insurance.—Dayton Ins. Co. v. Kelly, p. 345. Where an agent of a company entrusted with certificates for intermediary insurance, duly signed by the secretary of the company, with authority to deliver the same to applicants, erases therefrom without authority a material stipulation, the company will be bound to the same extent as if the era-

sure had been authorized, if the insured had no notice of the agent's want of authority. A condition in the usual printed policy of the company, that the insured shall give notice of all additional insurance, prior and subsequent, must be mentioned in, or endorsed on the certificate of intermediate or present insurance, containing a stipulation that it is granted, subject to the conditions of the policy.—Such condition is waived by accepting the risk on application, when the question as to prior insurance had been erased by the agent, and not answered.

Tax Titles—Military Warrant—Patent.—Matthews v. Rector, p. 439. In an action to recover the possession of land, by a person holding a patent from the United States, based on an equitable right acquired by the entry of the land on a military warrant, such person can not recover where it appears that the defendant is in possession under a tax title, and that his right to the land after the tax sale, and before the issuing of the patent, was fixed by the decree of a court of competent jurisdiction, against the person making the entry, under whom, as heir, the plaintiff obtained the patent. In such case the naked legal title remains in the United States, in trust for the person holding such equitable right to the land, and when the patent issues, it inures in equity, to the benefit of the holder of such equitable right.

Cited for plaintiff in error: Railway Co. v. Prescott, 16 Wall. 603, 607; Reed v. McGrew, 5 Ohio, 385; Hollingworth v. Barbour, 4 Pet. 466; Tiernan v. Beam, 2 Ohio, 283.

Cited for defendant in error: Buchanan v. Roy's Lessees, 2 Ohio St. 251; Gwynne v. Niswanger, 20 Ohio, 556; Lessee of Fowler v. Whiteman, 2 Ohio, St. 270, 286, and cases there cited; Bigelow v. Bigelow, 4 Ohio, 138; 6 Wheat. 109; 1 How. 134; 12 Pet. 492. See LeBeau v. Armitage, 2 CENT. L. J. 321.

Jurisdiction—Decree in Chancery.—Burnley v. Stevenson, p. 474. A court of equity in one state, having acquired jurisdiction over the persons of the parties, may enforce a trust, or the specific performance of a contract, in relation to land situate in another state. Although the decree in such case, or the deed of a master executed in pursuance thereof, can not operate to transfer the title to such lands, yet the decree is binding upon the consciences of the parties, and concludes them in respect to all matters and things properly adjudicated and determined by the court. When the decree in such case finds and determines the equities of the parties, in respect to such land, and directs a conveyance by the parties in accordance with their equities, such decree, although no conveyance has been executed, may be pleaded as a cause of action, or as a ground of defence, in the courts of the state where the land is situated; and it is entitled, in the court where so pleaded, to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud.

Argued for the motion for a petition in error: The issue is reduced to the single question: Can the decree of a court of general jurisdiction, if you please, of a sister state and the deed of a commissioner of said court, made in pursuance of such decree, divest the title of the defendants in such decree, to land in the state of Ohio?

The title to land in Ohio can only be divested under and in pursuance of the laws of Ohio. Lessee of Shepherd v. The Commissioners of Ross County, 7 Ohio, (pt. 1), 272; Watts v. Waddle, 6 Pet. 400; United States v. Crawsby, 7 Cranch, 115; Watkins v. Holman, 16 Pet. 25.

The question is not whether the court had jurisdiction, but whether the court had the power to change the title.

Equity may aid a deed, rendered inoperative by accident or mistake, when the grantor had power to convey, but it can not supply the want of power. Nowler v. Coit, 1 Ohio, 522; Wells v. Cooper, 2 Ohio, 124, Tiernan v. Beam, 2 Ohio, 393; Henry v. Doctor, 9 Ohio, 49; Salmon v. Rice, 13 Ohio. 368; Watkins v. Holman, 2 Pet. 25.

Argued contra: To entitle a court of equity to maintain a bill for the specific performance of a contract respecting land, it is not necessary that the land should be situated within the jurisdiction of the state or county, where the suit is brought. 2 Story's Eq. Jur. secs. 743, 744, 899, 900; Sutpha v. Fowler, 9 Paige Ch. 280; Massie v. Watts, 6 Cranch, 148, and cases there cited and commented on.

The Fayette Circuit Court of Kentucky, being a court of competent and general jurisdiction, and having the persons of all the then owners of the land, the defendants, before it, the decree rendered by said court is binding, and can not be impeached in this or any collateral action. Elliott v. Piersol, 1 Pet. 340: Thompson v. Tolmie, 2 Pet. 157; Voorhies v. Bank U. S., 10 Pet. 449; Sheldon v. Newton, 3 Ohio, 494; Boswell v. Sharpe, 15 Ohio, 447; Buchanan v. Roy, 2 Ohio St. 250; Herman on Estoppel, 211; Story's Conflict of Laws, sec. 598, 2 Smith's Leading Cases (top paging), 667, 686; Anderson v. Anderson, 8 Ohio, 108.

Full faith and credit shall be given in each state to the public acts, records and judicial proceedings, of every other state. Art. 4, sec. 1, Constitution; 1 Brightly's Dig. 10, and note *a*, 265, sec, 9, note *k*; 1 Ohio, 259; 13 Pet. 312, Pelton v. Platner, 13 Ohio, 209; 3 Wheat. 234.

Cited by the court: Cases *supra*; Brown v. L. & D. R. R. Co., 2 Beasley Eq. 191; Dobson v. Pearce, 2 Kernan, 156, U. S. Bank v. Bank of Baltimore, 7 Gil. 415. Motion overruled.

Homestead—Excess after Satisfying Mortgage-Lien—Voluntary Dispersion of Family.—Cooper v. Cooper, p. 488. The homestead of a debtor, being subject to mortgages and judgment-liens, was sold, at the suit of the lienholders, for $472 more than sufficient to satisfy the mortgages, which sum the debtor, being then the head of a family, moved the court having custody of the fund to decree to him in lieu of a homestead as against the judgment lienholders; but before the fund was disposed of by the court, he voluntarily permitted his family to separate and abandoned the maintenance of a family homestead. *Held:* That the right of a debtor to the fund must be determined upon the state of facts existing at the time the fund was finally disposed of by the court; and that the debtor had then ceased to be the head of a family within the meaning of the homestead exemption act, and was not entitled to any of the exemptions therein provided.

Contribution Between Co-sureties—Measure of Contribution—Liability.—Wilson v. Stewart, p. 504. Plaintiff and defendant were co-sureties for M. on a note payable to K. Plaintiff and others were also co-sureties for M., on divers other notes. M. conveyed certain lands to plaintiff by deed of mortgage, the condition being that the deed should become void if the grantor should "pay, or cause to be paid, all said several notes according to the tenor and effect thereof," and should save the plaintiff from the payment of money on account of the same. M. being insolvent, failed to pay the notes or to cause them to be paid according to the condition of the deed. The mortgage property was insufficient to pay all the notes mentioned in the mortgage. For the purpose of paying the note of K. in full, the plaintiff afterward released the mortgage as to a part of the lands, and procured M. to convey the same in fee to K. The note of K. was thus fully satisfied, and the defendant discharged from liability thereon. The balance of the mortgaged property was subsequently subjected to the payment, *pro rata*, of the other notes mentioned in the mortgage, leaving, however, a large deficit, for which the plaintiff and his co-sureties therein remain liable. These co-sureties, afterward compelled the plaintiff to account and pay to them the value of so much of the lands which had been conveyed to K., as was in excess of the proportion of the property properly applicable to the payment of K.'s note. Thereupon the plaintiff brought his original action, in the court below, to compel the defendant to contribute a moiety of the amount which he had been thus compelled to pay to his other co-sureties. *Held*: That upon the above state of facts, the plaintiff is entitled to an account and contribution from the defendant. The amount of such contribution should be a moiety of the value of so much of the lands conveyed to K., as was in excess of the amount which would have been applicable to the payment of K.'s note, upon a *pro rata* distribution of the whole property, among the several notes mentioned in the mortgage. The plaintiff's right to contribution, upon the above state of facts, would not be defeated by the mere additional circumstances, that at the time K. accepted the conveyance in payment of his claim, and as a part of the same transaction, M. procured from K. a contract in relation to the lands conveyed, beneficial to himself alone. If, however, the plaintiff released the mortgage, for the sole benefit of the mortgagor, or for the purpose of obtaining his own discharge from liability on K.'s note, without exercising good faith toward his co-surety therein, he ought not to have contribution from him, though his conduct, incidentally, but unintentionally, resulted also in discharging the co-surety from liability on the note.

Will—Bequest to Charitable Purpose when Upheld.—Miller v. Teachout, p. 525. A testator provided in his will that the residue of his estate, which consisted of personal property, after paying legacies, should be retained by his executor and invested by him during the life of his wife for her use, and that at her death it should be appropriated by the executor to the advancement of the Christian religion, and be applied in such manner as, in his judgment, would best promote the object named. The executor accepted the trust; and during his life and that of the widow, the heir brought suit to annul the will for uncertainty as to the object of the trust. *Held*, that the testator had conferred ample power upon the executor to relieve the bequest of all objections arising from its indefinite character, and that so long as no obstacle exists to the exercise of the power at the proper time, the courts of this state will not, in advance of that time, interpose, on the application of the heir, to prevent its exercise.

Argued for plaintiff: that the bequest and the trust sought to be created by the third item of this will, is inoperative and void:

I. Because it is too general, vague and indefinite to be applied to any certain charitable use.

II. Because there is no *cestui qui trust* or beneficiary *in esse*, or who can hereafter be ascertained or made certain, named in the will creating the trust.

III. Because it is impossible ever to establish a breach of the trust by the defendant, on account of its uncertainty—the trustee having the sole and exclusive right to expend the fund in such manner as, in his judgment, will best promote the object named.

IV. Because, in case of the failure or refusal of the trustee to execute the trust, the beneficiary (if any there be) is so uncertain and indefinite, and the object of the testator's charity so vague and intangible, that no court of equity could define, carry out, or enforce the trust by judicial decree. Citing, Owens v. Missionary Society of the Methodist Episcopal Church, 13 N. Y. 380; Grimes' Ex'rs v. Harmon, 9 Amer. 960; 35 Ind. 198; Phelps' Ex'r v. Pond, 23 N. Y. 69; Philadelphia Baptist Association v. Hart's Ex'rs, 4 Wheat. 1; Beekman, Adm'r, v. Bonsor, The People, *et al.*, 23 N. Y. 298; Fountain v. Ravenel, 17 How. 369; Norris v. Thompson, 4 C. E. Green (N. J.). 308; Perry on Trusts, 658 *et seq.*; Brown v. Yeall, 7 Ves. 50, n. 76; 9 Ves. 406; Holland v. Peck, 2 Ired. Ch. 255; Green v. Allen, 5 Hump. 170; Bridges v. Pleasants, 4 Ired. Ch. 26; White v. Fisk, 22 Conn. 31; Ellis v. Seley, 1 Sim. (Eng.) 352; Vesey v. Jamson, 1 Sim. & Stu. 69; Morice v. Bishop of Durham, 9 Ves. 399; James v. Allen, 3 Mer. 17; Attorney-General v. Haberdashers' Co., 1 Myl. & K. 428; Williams v. Kershaw, 5 Law Jour. (N. S) Ch. 84; Ommanney v. Butcher, 1 Turn. & Russ. 260; Downing v. Marshall, 23 N. Y. 366; Levy v. Levy, 33 N. Y. 97; Bascomb v. Albertson, 34 N. Y. 584; Wildeman v. Baltimore, 8 Md. 550; Methodist Church v. Warren, 28 Md. 338; Dashiel v. Attorney-General, 1 Bland, 529; Beaty v. Kuntz, 2 Pet. 566; Gallego's Ex'r v. Attorney-General, 3 Leigh, 450.

Argued for defendant: It is considered a settled rule that gifts *inter vivos*, or by will, to charitable use, are to receive a most liberal construction.—Zanesville Canal and Mfg. Co. v. Zanesville, 20 Ohio, 483; Umbrey v. Wooden, 1 Ohio St. 160, and authorities there cited.

In addition to persons capable of taking legal estates, the equitable interest in both real and personal estate may be held for the benefit of many objects as *cestui qui trusts*, whose separate existence, as the recipient of property, are not recognized by the common law. Hill on Trustees, 35. Such are all public charities. Such is the Christian religion. McIntire Poor School v. Zanesville Canal and Manufacturing Co., 9 Ohio, 287. It is immaterial how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects. Whitman v. Lex, 17 Serg. & Rawle, 88; Vidal v. Girard Ex'r, 2 How. 127.

From time immemorial, courts of chancery have compelled the executor or trustee to perform the trust, at the suit of the *cestui qui trust*, if there is one capable of bringing suit; if not, then at the suit of the attorney-general, in England. In Ohio, formerly, probably by the prosecuting attorney of the proper county (9 Ohio, 290), and now certainly by the attorney-general. Swan's Rev. Stat., 1854, sec. 14, pp. 51, 52.

For the decisions of the English courts as to the validity of gifts, this court is referred to 2 Story's Eq. Jur., sec. 1164, n. 7; Hull v. Burns, 2 Dow. & L. 102; Powerscourt v. Powerscourt, 1 Molloy, 616; 7 Ves. Jr. 39; 1 Keen, 224; Hill on Trustees, 80, 333; Townsend v. Carns, 13 Law Jour. (N. S.) Ch. 169. The attention of the court is especially called to Bryant v. McCandless, 7 Ohio (pt. 2), 135; McIntire Poor School v. Zanesville Mfg Co., 9 Ohio, 287; Umbrey v. Wooden, 1 Ohio St. 160; Wills v. Cowper and Parker, 2 Ohio, 131; Whitman v. Lex, 17 S. & R. 88; Inglis v. Trustees of the Sailors' Snug Harbor, 3 Pet. 99; Williams v. Williams, 4 Seld. 525.

Judgment for defendant.

Partnership—Use of Name of Retiring Partner.—Speer v. Bishop, p. 598. A copartnership consisting of a father and son, carried on business under the firm name of H. S. & Co. H. S., the father, who was a man of means, and gave the firm its credit, sold his interest in the firm to his partner and another son, who, by agreement with the father, continued the business as theretofore in the firm name of H. S. & Co. In an action by a creditor who had trusted the new firm on the faith that the father was a member: *Held*, that the father, by allowing his name to be so used, held himself out as a member of the new firm, and was thereby estopped from denying the fact, although publication had been made of the dissolution of the old and the formation of the new firm, of which the creditor had, in fact, no notice.

Railway Crossing—Negligence of Person Killed by Train, in a Suit by Legal Representative.—Cleveland, Columbus and Cincinnati Railroad Co. v. Crawford, administrator, p. 631. Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so, without a reasonable excuse therefor, is negligence, and will defeat an action by such person for an injury to which such negligence contributed. But the omission to use such precautions, by a person injured, will not defeat his action, if, by due diligence in their use, the consequence of the defendant's negligence would not have been avoided. Nor will the failure to use such precautions be regarded as negligence on the part of the plaintiff, if, under all the circumstances of the case, a person of ordinary care and prudence would be justified in omitting to use them See also, Balt. & O. R. R. Co. v. Whittaker, p. 642; Marietta & Cin. R. R. Co. v. Picksley, p. 654; Bellefontaine Railway Co. v. Snyder, p. 670.

C. A. C.

Book Notices.

A DIGEST OF THE REPORTED DECISIONS OF THE COURTS OF OHIO. Embracing the Ohio Reports, twenty volumes; The Ohio State Reports to the 24th O. S.; Tappan's, Wright's, Handy's, Disney's Reports; The Superior Court Reporter; Western Law Journal; Weekly Law Gazette; Western Law Monthly; American Law Record; and Cleveland Law Record; together with the Statutes of General Application. By A. H. McVEY, of the Toledo Bar. In Two Volumes. Cleveland, O.: Ingham, Clark & Company. 1875.

In his preface Mr. McVey says: "The design of the author of this work has been to produce a complete digest of all the reported decisions of the courts of the state, which have been preserved in permanent form, together with a digest of, and reference to, the statutes applicable to the decisions made, or the subject presented. * * * * Neither the syllabus of the case digested, except when the work of the court, nor the statement of the points decided, as presented in the reporters' notes, have been relied upon, as they have been found in many instances incorrect, and in others to convey an imperfect idea of the ground covered by the decision; the language of the court has, however, been preserved so far as consistent with the brevity required. The arrangement and analysis of the work have been made as complete as possible, without presenting the same point under different chapters and headings. To supplement any inconvenience thus occasioned, and to render the facility of reference as complete as may be, an analytical Index to the points decided and applications, has been carefully prepared, and will be found at the close of the second volume. A table of overruled cases will be found at the beginning of the first volume, the point overruled being given, which, in many instances, is only a part of the decision rendered. A short account of the several courts of the state, and of the different series of reports and magazines, more especially for the imformation of members of the profession resident outside of the state, has been prefixed to volume first. * * * * The date of every decision has been given, thus putting the practitioner upon notice as to whether any subsequent modification of the law may have taken place. * * * * The digest of the decisions of the inferior courts has been placed in smaller type, thus being readily distinguished from those of the court of last resort. The digest of the statutes will be found in foot notes, with the date of the enactment prefixed, and the volume and page where found, appended. A table of cases cited, followed, criticised, limited, doubted and approved; and a list of statutes construed; and also a table of cases which have in any way illustrated or expounded the constitution of 1851 will be found in the second volume. These tables, which have been prepared with great labor, will, it is believed, be found full and complete. The author desires to acknowledge his obligations for courtesies shown by many members of the Ohio bar, and Benjamin Vaughan Abbott, Esq., of New York, whose complete system of digesting has greatly benefitted the profession."

The preface does not overstate the kind or quality of the work done for the profession in the preparation of these volumes. In fact, we have in addition, in the first volume, the rules of court of general application throughout the state, and in the second volume, a table of the cases digested, with references to the original reports and the pages of the digest. The work is a complete index to the case and statute law of Ohio, as it exists to-day, and must be of very great convenience to the courts and bar of that state. A feature not commonly found in state digests is that of citations from English reports, and the reports of the other states, and of the United States, corroborating or bearing upon the point decided. Such citations, if carefully selected from leading cases are of great value, and give to the work an importance it would not otherwise have in the libraries of the profession outside of the state of Ohio.

It would seem, however, that the convenience of these volumes would have been enhanced by more careful condensation. With a complete and accurate table of cases, the tables of overruled and cited cases could have been dispensed with as separate parts of the work. These should have been incor-

porated in the body of the work, so that the reader could have seen, at a glance, when looking at the digest of a case, whether it had been overruled or not, and when, and where cited. The greater part of the labor was accomplished when the table had been prepared. A little more labor would have saved labor and trouble to the profession, and space in the volume. Take, for instance, in the table of overruled cases, that of Card v. Patterson, 5 O. S. 319, said to have been overruled by Wend v. McIntosh, 12 O. S. 231. On page 10 of Vol. 1, where this case is digested (§ 32), no statement is made that the case has been overruled, nor is 12 O. S. cited; while in § 28 on same page the case is digested in another form, and 12 O. S. 231 is cited as though confirming the decision. There is a misprint in the table of cases as to this same case of Card v. Patterson, Vol. 2, p. 484. Instead of "ii, 10, 191, 337," read i, 10, 191, ii, 337. The case of Bigelow v. Bigelow, 4 O. 147, is omitted altogether from the table of cases.

On page 125 of Vol. 1 is found, under the title "Contracts," the following:

"86. IN RESTRAINT OT TRADE—WHEN ENFORCEABLE.—Before a contract in restraint of trade can be enforced, it must appear from the pleadings and proofs, first, that the restraint is only partial; second, that it is founded upon a valuable consideration; and, third, that a contract is reasonable and not oppressive. 1853, Lange v. Werk, 2 O. S. 519; 1 P. Wms. 181; Willes 328; 3 Bing. N. C. 113, 3 Bro. P. C. 349; 8 East. 83; 3 Bing. 328; 5 T. R. 118; 7 Bing. 743; 5 M. & W. 548; 13 Id. 695."

On the next page is the following:

"88. IN RESTRAINT OF TRADE. All contracts in general restraint of trade are opposed to public policy and void; and contracts in partial restraint are illegal, except when founded upon a valuable consideration and reasonable. 1853, Lange v. Werk, 2 O. S. 519; 11 O. S. 349; Niles 328; 3 Bing. N. C. 113; 3 Bro. P. C. 349; 8 East. 83; 3 Bing. 328; 1 C. & J. 331; 5 T. R 118; 7 Bing. 743; 5 M. & W. 548, 62 Eng. C. L. 721."

It is submitted, in behalf of over-worked lawyers, and they are the men who are obliged to make the largest use of digests, that one or the other of the above paragraphs should have been omitted. More accurate proof-reading would not have allowed the citation "Willes, 328," in one paragraph, and "Niles, 328," in the next but one.

The mechanical execution of these volumes, save in the matter of proof-reading, is very creditable In regard to typographical errors the writer has detected many more than are noticed above. It is much to be regretted that a little more time had not been given to a thorough revision of the whole work in this respect.

The arrangement of titles is on the general plan adopted by Abbott in the United States Digest, and it is to be hoped that other compilers of state digests may follow the same plan, that we may have some uniformity of classification.

E. T. A.

THE LAW OF TRESPASS IN THE TWO-FOLD ASPECT OF THE WRONG AND THE REMEDY. By THOS. W. WATERMAN, ESQ. New York: Baker, Voorhis & Co. 1875. Vol. 1.

The first volume of Mr. Waterman's new work well satisfies the expectations its announcement created. The work will be completed with another volume, now in press, which is devoted solely to trespass on real property. The present volume, complete in itself, relates to trespass to the person and to personal property. It is our purpose, when the entire work is before the profession, to give it such a notice as its merits require; but in the meantime we desire to say that it is manifest, from the volume before us, that the author, who is well-known to the profession by his previous writings, has brought to this work all his industry, skill and experience. His subject is one eminently practical, and it is treated in a practical and extremely satisfactory manner. This work can not fail to advance the already enviable reputation of its learned author.

J. F. D.

Legal News and Notes.

—THE Saint Louis Globe and the Saint Louis Democrat have consolidated, and the united journal instead of showing an improvement, or even maintaining the standard of the Globe, has sunk to the level of the Democrat.

—NEW HAMPSHIRE is so far behind the age, that it has a provision in its constitution prohibiting Catholics from holding office; and Rhode Island has a like discrimination against persons of foreign birth.

A SEWING MACHINE DECISION.—A case came before one of the courts in New York city recently, involving the right of sewing machine companies to reclaim machines for non-payment of installments of the purchase-money without refunding the amount already paid. It seems that the Howe Sewing Machine Company, like many other companies, in selling their machines, make it a condition that whenever payment is to be made by installments, the machines are to be considered as leased, and the purchasers are to forfeit all the money paid, upon a failure to pay any installment when due. The plaintiff in the case was a widow who brought suit to recover $65 that she had paid on account of a sewing machine which was valued at $70, but which was taken from her because the last installment of $5 was not paid when due. When the machine was taken from her she offered to pay the $5 which was overdue, but this was refused. The plaintiff also denied that the signature to the contract of sale, including the forfeiture, was hers. The judge, in deciding the case, said that sales of this character, with the right to take the machines back by force, when nearly the full value has been paid, without refunding what has been paid or any part thereof, are contrary to public policy, and unjust and oppressive to a deserving class of people. Judgment was, therefore, given for the plaintiff, and the $65 was paid over.—[*The Legal Chronicle.*

—JESTING.—Nothing would tend so much to sharpen our wits and improve the general tone of conversation as a knowledge that the perpetrators of poor or ill-timed jests were liable to be mulcted in heavy damages by a court of law. A step in this direction was taken lately at Nairn, in Scotland, where a fish-curer named Rose sued an auctioneer named Gordon, in the small debt court, for £12 damages, for using insulting and contumacious language towards him at a public sale. It appeared that the auctioneer was selling, among other things, some wires for filing letters, and when some of them were purchased by the fisherman, remarked that they would "do fine for hanging cod." This observation cut Rose to the very quick, inasmuch as it called public attention to his profession in such a manner as to make him "a laughing-stock to the crowd." On the other hand, Gordon, while admitting that he had made a remark to the effect stated, urged that it was simply "a harmless joke, at which he never dreamt Mr. Rose would be offended." Judgment was given in favor of the defendant, the sheriff thinking the joke was "a poor one," but not such as to justify the award of damages. Gordon has had a narrow escape, for, if the poverty of the jest had been actionable, the decision would evidently have gone against him; he was only saved by its harmlessness. All's well that ends well; but the fact that one joker has only escaped narrowly is sufficient to create a widespread feeling of uneasiness in jocular circles.—[*The Irish Law Times.*

—THE Council of the Association for the Reform and Codification of the Law of Nations, have issued a circular in which they state, that with reference to private international law, "it was, at the last conference, determined to direct attention primarily to the following subjects: 1. Bills of Exchange; 2. Foreign Judgments; 3. Copyright; 4. Patent Law; 5. Trade-marks. The consideration of the existing state of the law in different countries on these questions, and the best plan for adopting some systematic mode of obviating the conflicts existing with regard thereto, was then entrusted to a special committee nominated for that purpose. This committee has, after mature consideration, felt the necessity of devoting attention to these subjects one by one. In the belief that no question affects so large a section of the commercial community as that of bills of exchange, and that public opinion is already ripe seriously to consider the importance of the assimilation of the laws and practice relating thereto, this committee has determined that its first efforts should be directed to the best mode of bringing about a uniform system of law and custom in regard thereto." The committee have issued a series of questions which they have forwarded to chambers of commerce, bankers, jurists, and others in various countries, seeking their opinion, alike as to the difficulties now found to exist with reference to the subject, and the best method of providing a remedy. If the questions are at all generally answered, the result will be curious and instructive.—[*Solicitor's Journal.*

—COMPROMISING A FELONY.—A capital story is told of a German convict in Lichtenstein. There being no prison in this little principality, the convict, who had stolen some silver spoons, was lodged in a room of the palace, the sentence being a year's imprisonment. The thief was kept in considerable comfort, and upon good, substantial diet, so that he rather enjoyed his quarters. But the princess, having got over the novelty of staring at the thief through the keyhole, decided that it was not pleasant to live under the same roof with a man of dishonest principles. Accordingly, negotiations were entered into with the thief to discharge him if he would only amend. But the thief not only declined to give any such promise, but energetically claimed his right to be fed and housed for the full term of his sentence. This was most embarrassing. His Highness's financial counsellor reduced the question to one of money, and offered the thief a certain sum, on condition that he would embark for America. The thief met this proposal in an accommodating spirit, but pointed out, reasonably enough, that the negotiators were bound to take account of the perils of the voyage, and also to indemnify him for his willingness to spend the remainder of his life in exile. Eventually the matter was settled by the thief receiving nearly double the sum originally offered, and being escorted to the station by one of the princess's footmen. Of course he never went to America, but settled in England, "where," says the cynical relator of this anecdote, "he has been either hanged or knighted."—[*The Law Times.*